

**UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF
TEXAS, DALLAS DIVISION**

In Re: Highland Capital Management, L.P § Case No. **19-34054-SGJ11**

Charitable DAF Fund, L.P et al

Appellant

§

vs.

§

21-03067

Highland Capital Management, L.P

§

Appellee

§

3:23-CV-01503-B

[167] Order granting Defendant Highland Capital Management, L.P.'s Renewed motion to dismiss adversary proceeding (related document # [122](#)) Entered on 6/25/2023.

Volume 33

APPELLANT RECORD

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and CLO Holdco, Ltd.*

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

In re:	§ Chapter 11
	§
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§ Case No. 19-34054-sgj11
	§
Debtor.	§
	§
CHARITABLE DAF FUND, L.P. AND CLO	§
HOLDCO, LTD., DIRECTLY AND DERIVATIVELY	§
	§
Plaintiffs,	§ Adversary Proceeding No.
	§
vs.	§ 21-03067-sgj11
	§
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§
HIGHLAND HCF ADVISOR, LTD., AND	§
HIGHLAND CLO FUNDING LTD., NOMINALLY	§
	§
Defendant.	§
	§

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**APPELLANTS' SECOND AMENDED STATEMENT OF ISSUES
AND DESIGNATION OF RECORD ON APPEAL**

Pursuant to Rules 8009(a)(1)(A)-(B) and (a)(4) of the Federal Rules of Bankruptcy Procedure, The Charitable DAF Fund, L.P. and CLO Holdco, Ltd. ("Appellants") hereby designate the following items to be included in the record and identify the following issues with respect to

their appeal of the Order Granting Defendant Highland Capital Management, L.P.'s "Renewed Motion to Dismiss Complaint" [Adv. Proc. Doc. No. 122] which was entered by the United States Bankruptcy Court for the Northern District of Texas on June 25, 2023.

I. STATEMENT OF ISSUES TO BE PRESENTED ON APPEAL

- Whether the Bankruptcy Court had jurisdiction to rule on Highland Capital Management L.P.'s Renewed Motion to Dismiss Complaint
- Whether the Renewed Motion to Dismiss Complaint was improperly granted

II. DESIGNATION OF ITEMS TO BE INCLUDED IN THE RECORD

Vol. 1
000001

1. Notice of Appeal for Bankruptcy Case Adversary Proceeding No. 21-03067-sgj11 [Doc. 168].

000042

2. The judgment, order, or decree appealed from: Memorandum Opinion and Order Granting Defendant Highland Capital Management, L.P.'s "Renewed Motion to Dismiss Complaint" [Adv. Proc. Doc. No. 122] [Doc. 167].

000080

3. Docket Sheet kept by the Bankruptcy Clerk.

4. Documents listed below and as described in the Docket Sheet for Bankruptcy Case Proceeding No. 21-03067-sgj.

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No.	Date Filed	Docket No.	Description/Document Text
1	9/29/21	1	(36 pgs; 3 docs) Adversary case 21-03067. ORDER REFERRING CASE NUMBER 21-CV-0842-B from U.S District Court for the Northern District of Texas, Dallas Division to U.S. Bankruptcy Court for Northern District of Texas, Dallas Division. Complaint by Charitable DAF Fund, LP, CLO Holdco, Ltd. against Highland Capital Management, LP, Highland HCF Advisor Ltd., Highland CLO Funding, Ltd. Fee Amount \$350 (Attachments: # 1 Original Complaint # 2 Docket Sheet from 3:20-cv-0842-B) Nature(s) of suit: 02 (Other (e.g. other actions that would have been brought in state court if unrelated to bankruptcy)). (Okafor, M.)
2	9/29/21	2	(1 pg) Supplemental Document (cover sheet) by CLO Holdco Ltd., Charitable DAF Fund (RE: related document(s)1 Adversary case 21-03067) [ORIGINALLY FILED IN 21-CV-0842 AS #2 ON 04/13/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)

Vol. 2 000139 000232 000239 000270 Thru Vol. 6	3	9/29/21	6	(93 pgs; 6 docs) MOTION for Leave to File First Amended Complaint filed by CLO Holdco Ltd., Charitable DAF Fund LP (Attachments: # 1 Exh 1_First Amended Complaint # 2 Exh 2_Motion for Authorization to Retain James Seery # 3 Exh 3_Order Approving Retention of James Seery # 4 Exh 4_Order Approving Settlement # 5 Proposed Order) (Bridges, Jonathan) (Entered: 04/19/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #6 ON 04/19/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
	4	9/29/21	22	(7 pgs; 2 docs) MOTION for an Order to Enforce the Order of Reference filed by Highland Capital Management LP. (Attachments: # 1 Exhibit(s) A--Proposed Order) (Annable, Zachery) Modified text on 5/20/2021 (mjr). (Entered: 05/19/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #22 ON 05/19/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
	5	9/29/21	23	(31 pgs) Brief/Memorandum in Support filed by Highland Capital Management LP re: 22 MOTION for an Order to Enforce the Order of Reference. (Annable, Zachery) Modified text on 5/20/2021 (mjr).(Entered: 05/19/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #23 ON 05/19/2021 IN U.S.DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
	6	9/29/21	24	(926 pgs; 29 docs) Appendix in Support filed by Highland Capital Management LP re: 23 Brief/Memorandum in Support. (Attachments: # 1 Appendix 1 # 2 Appendix 2 # 3 Appendix 3 # 4 Appendix 4 # 5 Appendix 5 # 6 Appendix 6 # 7 Appendix 7 # 8 Appendix 8 # 9 Appendix 9 # 10 Appendix10 # 11 Appendix 11 # 12 Appendix 12 # 13 Appendix 13 # 14 Appendix 14 # 15 Appendix 15 # 16 Appendix 16 # 17 Appendix 17 # 18 Appendix 18 # 19 Appendix 19 # 20 Appendix 20 # 21 Appendix 21# 22 Appendix 22 # 23 Appendix 23 # 24 Appendix 24 # 25 Appendix 25 # 26 Appendix 26 # 27 Appendix 27 # 28 Appendix 28) (Annable, Zachery) Modified linkage and text on 5/20/2021 (mjr). (Entered:05/19/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #24 ON 05/19/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
Vol. 7 001196	7	9/29/21	26	(7 pgs; 2 docs) MOTION to Dismiss Complaint filed by Highland Capital Management LP (Attachments: # 1 Exhibit(s) A--Proposed Order) (Annable, Zachery) Modified text on 5/28/2021 (jmg).(Entered: 05/27/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #26 ON 05/27/2021 IN U.S.DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)

Vol. 7 001203 thru Vol. 8	8	9/29/21	28	(508 pgs; 14 docs) Appendix in Support filed by Highland Capital Management LP (Attachments: # 1 Appendix 1 # 2 Appendix 2 # 3 Appendix 3 # 4 Appendix 4 # 5 Appendix 5 # 6 Appendix 6 # 7 Appendix 7 # 8 Appendix 8 # 9 Appendix 9 # 10 Appendix 10 # 11 Appendix 11 # 12 Appendix 12 # 13 Appendix 13) (Annable, Zachery) (Entered: 05/27/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #28 ON 05/27/2021 IN U.S. DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
Vol. 9 001711	9	9/29/21	33	(1 pg) Amended Civil Cover Sheet by CLO Holdco Ltd, Charitable DAF Fund LP. Amendment to 2 Supplemental Document. (Sbaiti, Mazin) Modified text on 6/23/2021 (mjr). (Entered: 06/22/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #33 ON 06/22/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001712	10	9/29/21	36	(26 pgs) RESPONSE filed by CLO Holdco Ltd, Charitable DAF Fund LP re: 22 MOTION for an Order to Enforce the Order of Reference (Sbaiti, Mazin) (Entered: 06/29/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #36 ON 06/29/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001738	11	9/29/21	37	(22 pgs) Appendix in Support filed by CLO Holdco Ltd, Charitable DAF Fund LP re 36 Response/Objection Response to Motion for an Order to Enforce the Order of Reference (Sbaiti, Mazin) (Entered: 06/29/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #37 ON 06/29/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001760	12	9/29/21	38	(45 pgs) RESPONSE filed by CLO Holdco Ltd, Charitable DAF Fund LP re: 26 MOTION to Dismiss (Defendant Highland Capital Management, L.P.'s Motion to Dismiss Complaint) (Sbaiti, Mazin) (Entered: 06/29/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #38 ON 06/29/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001805	13	9/29/21	39	(88 pgs) Appendix in Support filed by CLO Holdco Ltd, Charitable DAF Fund LP re 38 Response/Objection to Defendant Highland Capital Management, L.P.'s Motion to Dismiss Complaint (Sbaiti, Mazin) (Entered: 06/29/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #39 ON 06/29/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001893	14	9/29/21	42	(12 pgs) REPLY filed by Highland Capital Management LP re: 22 MOTION for an Order to Enforce the Order of Reference (Annable, Zachery) (Entered: 07/13/2021) [ORIGINALLY FILED IN 21-CV-0842AS #42 ON 07/13/2021 IN U.S.

			DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
VOL. 9	15	9/29/21	43 (852 pgs) Appendix in Support filed by Highland Capital Management LP re: 42 Reply. (Annable, Zachery) Modified text on 7/14/2021 (mjr). (Entered: 07/13/2021) [ORIGINALLY FILED IN 21-CV-0842AS #43 ON 07/13/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001905 thru Vol. 13	16	9/29/21	45 (21 pgs) REPLY filed by Highland Capital Management LP re: 26 MOTION to Dismiss (Defendant Highland Capital Management, L.P.'s Motion to Dismiss Complaint) (Annable, Zachery) (Entered:07/13/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #44 ON 07/13/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
002757	17	9/29/21	57 (7 pgs; 2 docs) MOTION to Dismiss and Joinder in Motion to Dismiss of Highland Capital Management, L.P. filed by Highland CLO Funding Ltd. (Attachments: # 1 Proposed Order) Attorney Paul R Bessette added to party Highland CLO Funding Ltd (pty:dft) (Bessette, Paul) (Entered: 08/30/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #57 ON 08/30/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
002778	18	9/29/23	58 (12 pgs) Brief/Memorandum in Support filed by Highland CLO Funding Ltd. re 57 MOTION to Dismiss and Joinder in Motion to Dismiss of Highland Capital Management, L.P. (Bessette, Paul) (Entered: 08/30/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #58 ON 08/30/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
002785	19	9/29/23	59 (80 pgs; 5 docs) Appendix in Support filed by Highland CLO Funding Ltd re 58 Brief/Memorandum in Support of Motion (Attachments: # 1 Exhibit(s) A - Jackson v Dear # 2 Exhibit(s) B - Prudential Assurance v. Newman # 3 Exhibit(s) C - Harbourvest Settlement Agreement # 4 Exhibit(s) D - Boleat Declaration) (Bessette, Paul) (Entered: 08/30/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #59 ON 08/30/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
002797	20	9/29/21	64 (1 pg) ORDER OF REFERENCE: Pursuant to 28 U.S.C. § 157 and this District's Miscellaneous Order No. 33, this case is hereby REFERRED to Judge Stacey G. C. Jernigan of the United States Bankruptcy Court for the Northern District of Texas, Dallas Division, to be adjudicated as a matter related to the consolidated Chapter 11 Bankruptcy of Highland Capital Management, L.P., Chapter 11 Case No.19-34054. (Ordered by Judge Jane J. Boyle
002877			

Vol. 14				on 9/20/2021) (svc) (Entered: 09/20/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #64 ON 09/20/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
002878	21	10/19/21	66	(5 pgs) Notice of hearing filed by Defendant Highland Capital Management, LP (RE: related document(s) 26 Motion to dismiss adversary proceeding filed by Defendant Highland Capital Management, LP, 47 Motion to strike document filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd., 55 Motion to abate filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) Hearing to be held on 11/23/2021 at 09:30 AM at https://us-courts.webex.com/meet/jerniga for 26 and for 47 and for 55, (Annable, Zachery)
002883 thru Vol. 16	22	11/22/21	71	(509 pgs; 2 docs) Witness and Exhibit List <i>for Hearing on November 23, 2021</i> filed by Defendant Highland Capital Management, LP (RE: related document(s) 26 Motion to dismiss adversary proceeding). (Attachments: # 1 Exhibits 1-13) (Hayward, Melissa)
Vol. 17	23	11/22/21	72	(2 pgs) Witness List filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 26 Motion to dismiss adversary proceeding, 47 Motion to strike (related document(s): 43 Document), 55 Motion to abate (related document(s) 1 Complaint), 69 Motion to abate <i>Plaintiffs' Amended Motion to Stay All Proceedings</i> (related document(s) 55 Motion to abate (related document(s) 1 Complaint))). (Sbaiti, Mazin)
003392				
003394	24	11/22/21	73	(189 pgs; 4 docs) Exhibit List <i>for November 23, 2021 hearing</i> filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 47 Motion to strike (related document(s): 43 Document), 55 Motion to abate (related document(s) 1 Complaint)). (Attachments: # 1 Exhibit 1_Defendant's Memorandum of Law in Support of Motion for Reconsideration # 2 Exhibit 2_Highland Memorandum in Support of Motion to Dismiss # 3 Exhibit 3_Order (I) Confirming Fifth Amended Plan of Reorganization of Highland) (Sbaiti, Mazin)
003583	25	12/7/21	80	(2 pgs) Order granting Highland CLO Funding, Ltd.'s motion to dismiss adversary as a party with prejudice (related document 57) Entered on 12/7/2021. (Okafor, Marcey) Modified text on 3/11/2022 (Okafor, Marcey).
003585	26	3/11/22	99	(26 pgs) Memorandum of Opinion and order granting motion to dismiss the adversary proceeding (RE: related document(s) 26 Motion to dismiss adversary proceeding filed by Defendant Highland Capital Management, LP). Entered on 3/11/2022 (Okafor, Marcey)
003611	27	3/11/22	100	(26 pgs) Order granting motion to dismiss adversary proceeding with prejudice (related document #26) Entered on 3/11/2022. (Okafor, Marcey)

Vol. 18 003637	28	3/21/22	104	(29 pgs) Notice of appeal. Fee Amount \$298 filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 100 Order on motion to dismiss adversary proceeding). Appellant Designation due by 04/4/2022. (Sbaiti, Mazin)
003666	29	5/26/22	120	(177 pgs; 2 docs) Support/supplemental document <i>Motion to Supplement Appellate Record</i> filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 111 Appellant designation). (Attachments: # 1 Amended Transcript of January 14, 2021 Hearing) (Sbaiti, Mazin)
003843	30	6/9/22	121	(1 pg) DISTRICT COURT Order: Case 3:22-00695-B is hereby transferred to the docket of the Honorable Judge Jane J. Boyle for consolidation with The Charitable DAF Fund LP, et al. v. Highland Capital Management LP, Case No. 3:21-cv-3129-N. Judge Karen Gren Scholer no longer assigned to case.(RE: related document(s) 86 Notice of appeal filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd., 104 Notice of appeal filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.). Entered on 6/9/2022 (Whitaker, Sheniqua) (Entered: 06/10/2022)
003844	31	10/24/22	122	(7 pgs) Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>) filed by Defendant Highland Capital Management, LP (Annable, Zachery)
003851	32	10/14/22	123	(31 pgs) Brief in support filed by Defendant Highland Capital Management, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>)). (Annable, Zachery)
Vol. 19 003882 Thru Vol 20	33	10/14/22	124	(513 pgs; 15 docs) Support/supplemental document (<i>Appendix in Support of Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>) filed by Defendant Highland Capital Management, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>)). (Attachments: # 1 Exhibit 1 # 2 Exhibit 2 # 3 Exhibit 3 # 4 Exhibit 4 # 5 Exhibit 5 # 6 Exhibit 6 # 7 Exhibit 7 # 8 Exhibit 8 # 9 Exhibit 9 # 10 Exhibit 10 # 11 Exhibit 11 # 12 Exhibit 12 # 13 Exhibit 13 # 14 Exhibit 14) (Annable, Zachery)
Vol. 21 004395	34	10/27/22	126	(5 pgs) Notice of hearing (<i>Notice of Hearing and Briefing Schedule on Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>) filed by Defendant Highland Capital Management, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding filed by Defendant Highland Capital Management, LP). Hearing to be held on 12/8/2022 at 09:30 AM at https://us-courts.webex.com/meet/jerniga for 122. (Annable, Zachery)

Vol. 21 004400 004410 004442 Thru Vol. 22	35	11/18/22	128	(10 pgs) Motion for withdrawal of reference. Fee amount \$188, filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (Sbaiti, Mazin)
	36	11/18/22	129	(32 pgs) Response opposed to (related document(s): 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>) filed by Defendant Highland Capital Management, LP) filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP. (Sbaiti, Mazin)
	37	11/18/22	130	(254 pgs; 2 docs) Response opposed to (related document(s): 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>) filed by Defendant Highland Capital Management, LP) filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP. (Attachments: # 1 Appendix) (Sbaiti, Mazin)
Vol. 22 004696 004717 004732 004737 004742	38	9/2/22	131	(21 pgs) DISTRICT COURT MEMORANDUM OPINION AND ORDER: The Court REVERSES and REMANDS the bankruptcy court's Motion to Dismiss Order and AFFIRMS the bankruptcy courts Motion to Stay Order. re: appeal on Civil Action number: Case 3:22-00695-B consolidated with 3:21-CV-3129-B, (RE: related document(s) 81 Order on motion to abate, 100 Order on motion to dismiss adversary proceeding). Entered on 9/2/2022 (Whitaker, Sheniqua) (Entered: 11/29/2022)
	39	12/2/22	133	(15 pgs) Reply to (related document(s): 129 Response filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd., 130 Response filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) filed by Defendant Highland Capital Management, LP. (Annable, Zachery)
	40	12/7/22	135	(5 pgs) Notice of hearing filed by Defendant Highland Capital Management, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding filed by Defendant Highland Capital Management, LP). Hearing to be held on 1/25/2023 at 01:30 PM at https://us-courts.webex.com/meet/jerniga for 122, (Annable, Zachery)
	41	12/7/22	136	(5 pgs) Notice of hearing filed by Defendant Highland Capital Management, LP (RE: related document(s) 128 Motion for withdrawal of reference filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.). Status Conference to be held on 1/25/2023 at 01:30 PM at https://us-courts.webex.com/meet/jerniga . (Annable, Zachery).
	42	12/9/22	138	(3 pgs) Response opposed to (related document(s): 128 Motion for withdrawal of reference. Fee amount \$188, filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) filed by Defendant Highland Capital Management, LP. (Annable, Zachery)

Vol. 22 004745	43	12/9/22	139	(25 pgs) Brief in support filed by Defendant Highland Capital Management, LP (RE: related document(s) 138 Response). (Annable, Zachery)
Vol. 23 004770	44	12/9/22	140	(280 pgs; 8 docs) Support/supplemental document (<i>Appendix in Support of Highland Capital Management, L.P.'s Response to Renewed Motion to Withdraw the Reference</i>) filed by Defendant Highland Capital Management, LP (RE: related document(s) 138 Response). (Attachments: # 1 Exhibit 1 # 2 Exhibit 2 # 3 Exhibit 3 # 4 Exhibit 4 # 5 Exhibit 5 # 6 Exhibit 6 # 7 Exhibit 7) (Annable, Zachery)
Vol. 24 005050	45	12/16/22	144	(6 pgs) Reply to (related document(s): 138 Response filed by Defendant Highland Capital Management, LP) filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP. (Sbaiti, Mazin)
005056 Thru Vol. 25.	46	1/23/23	145	(514 pgs; 15 docs) Witness and Exhibit List filed by Defendant Highland Capital Management, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>)). (Attachments: # 1 Exhibit 1 # 2 Exhibit 2 # 3 Exhibit 3 # 4 Exhibit 4 # 5 Exhibit 5 # 6 Exhibit 6 # 7 Exhibit 7 # 8 Exhibit 8 # 9 Exhibit 9 # 10 Exhibit 10 # 11 Exhibit 11 # 12 Exhibit 12 # 13 Exhibit 13 # 14 Exhibit 14) (Annable, Zachery)
Vol. 26 005570	47	1/23/23	146	(280 pgs; 8 docs) Witness and Exhibit List filed by Defendant Highland Capital Management, LP (RE: related document(s) 128 Motion for withdrawal of reference. Fee amount \$188.). (Attachments: # 1 Exhibit 1 # 2 Exhibit 2 # 3 Exhibit 3 # 4 Exhibit 4 # 5 Exhibit 5 # 6 Exhibit 6 # 7 Exhibit 7) (Annable, Zachery)
Vol. 27 005850	48	1/23/23	147	(221 pgs; 7 docs) Witness and Exhibit List filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>)). (Attachments: # 1 Exhibit 1_Excerpts from July 14, 2020 Hearing Transcript # 2 Exhibit 2_HCLOF Members Agreement Relating to the Company # 3 Exhibit 3_HarbourVest Settlement Agreement # 4 Exhibit 4_Order Approving Debtor's Settlement with HarbourVest # 5 Exhibit 5_HCLOF Offering # 6 Exhibit 6 Amended and Restated Investment Advisory Agreement) (Sbaiti, Mazin)
006071	49	1/23/23	148	(3 pgs) Witness and Exhibit List filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 128 Motion for withdrawal of reference. Fee amount \$188.). (Phillips, Louis)
Vol. 28 006074	50	1/25/23	150	(56 pgs; 2 docs) Amended Witness and Exhibit List filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 147 List (witness/exhibit/generic), 149 List (witness/exhibit/generic)). (Attachments: # 1 Exh 7_Testimony of Mark Patrick at June 8, 2021 hearing) (Sbaiti, Mazin)

Vol. 28 006130	51	1/25/23	152	(3 pgs) Notice of Appearance and Request for Notice by Louis M. Phillips filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP. (Phillips, Louis)
	52	1/25/23	154	(1 pg) Court admitted exhibits date of hearing January 25, 2023 (RE: related document(s) 128 Motion for withdrawal of reference, filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) (COURT ADMITTED DEFENDANT'S EXHIBITS #1, #2, #3, #4, #5 & #6 OFFERED BY ATTY GREG DEMO). (Edmond, Michael) (Entered: 01/27/2023)
Vol. 32 006925 006942 006960	53	2/6/23	158	Report and recommendation to the U.S. District Court by U.S. Bankruptcy Judge. (RE: related document(s) 128 Motion for withdrawal of reference filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.). Entered on 2/6/2023 (Okafor, Marcey)
	54	2/6/23	161	(18 pgs) DISTRICT COURT Notice of transmission of report and recommendation in re: renewed motion to withdraw reference. Civil Case # 3:22-cv-02802-S. (RE: related document(s) 158 Report and recommendation to the U.S. District Court by U.S. Bankruptcy Judge. (RE: related document(s) 128 Motion for withdrawal of reference filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.). Entered on 2/6/2023) (Whitaker, Sheniqua)
	55	4/3/23	165	(1 pg) DISTRICT COURT ORDER: The Court GRANTS the 11 Joint Motion to Transfer Proceeding and Consolidate Before Original Court and the above-numbered case (3:22-cv-02802-S) is transferred to the docket of the Honorable Judge Jane Boyle: Civil case 3:21-cv-00842-B (order referring case). (RE: related document(s) 1 Complaint filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd., 143 Notice of transmission of motion to withdraw reference). Entered on 4/3/2023 (Whitaker, Sheniqua) Modified on 4/10/2023 (Whitaker, Sheniqua). (Entered: 04/10/2023)

TRANSCRIPTS

006961	56	11/24/21	78	(104 pgs) Transcript regarding Hearing Held 11-23-2021 RE: Motion Hearing. THIS TRANSCRIPT WILL BE MADE ELECTRONICALLY AVAILABLE TO THE GENERAL PUBLIC 90 DAYS AFTER THE DATE OF FILING. TRANSCRIPT RELEASE DATE IS 02/22/2022. Until that time the transcript may be viewed at the Clerk's Office or a copy may be obtained from the official court transcriber. Court Reporter/Transcriber Liberty Transcripts/Dipti Patel, Telephone number 847-848-4907. (RE: related document(s) 75 Hearing held on 11/23/2021. (RE: related document(s) 55 MOTION to Stay filed by CLO Holdco Ltd, Charitable DAF Fund LP (Sbaiti, Mazin) (Entered: 08/26/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #55 ON 08/26/2021 IN U.S.
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			<p>DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)) (Appearances: J. Pomerantz and J. Morris for Highland Defendants; J. Jordan and P. Bessett for HCLOF; M. Sbaiti for Plaintiffs. Nonevidentiary hearing. Motion denied. Mr. Pomerantz to upload order.), 76 Hearing held on 11/23/2021. (RE: related document(s) 47 Motion to strike 43 Appendix in support filed by CLO Holdco, Ltd., Charitable DAF Fund, LP (Bridges, Jonathan) Modified text on 7/16/2021 (mjr). (Entered: 07/15/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #47 ON 07/15/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)) (Appearances: J. Pomerantz and J. Morris for Highland Defendants; J. Jordan and P. Bessett for HCLOF; M. Sbaiti for Plaintiffs. Nonevidentiary hearing. Motion denied (Plaintiffs acknowledged complained-of Appendices it did not relate to Motion to Dismiss). Mr. Pomerantz to upload order.)). Transcript to be made available to the public on 02/22/2022. (Patel, Dipti)</p>
57	2/21/23	164	<p>164 (112 pgs) Transcript regarding Hearing Held 1/25/23 RE: HEARING ON DEFENDANT HIGHLAND CAPITAL MANAGEMENT L.P.'S RENEWED MOTION TO DISMISS COMPLAINT (122) AND STATUS CONFERENCE RE: MOTION FOR WITHDRAWAL OF REFERENCE FILED BY PLAINTIFF CLO HOLDCO, LTD., PLAINTIFF CHARITABLE DAF FUND, LP (128). THIS TRANSCRIPT WILL BE MADE ELECTRONICALLY AVAILABLE TO THE GENERAL PUBLIC 90 DAYS AFTER THE DATE OF FILING. TRANSCRIPT RELEASE DATE IS 05/22/2023. Until that time the transcript may be viewed at the Clerk's Office or a copy may be obtained from the official court transcriber. Court Reporter/Transcriber Dipti Patel, Telephone number 847-848-4907. (RE: related document(s) 155 Hearing held on 1/25/2023. (RE: related document(s) 122 Motion to dismiss adversary proceeding, (Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint) filed by Defendant Highland Capital Management, LP filed by Defendant Highland Capital Management, LP) (Appearances: J. Morris and G. Demo for Movants; L. Phillips and M. Sbaiti for Plaintiffs. Evidentiary hearing (appendices). Court took matter under advisement.), 156 Hearing held on 1/25/2023. (RE: related document(s) 128 Motion for withdrawal of reference. Fee amount \$188, filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) (Appearances: J. Morris and G. Demo for Movants; L. Phillips and M. Sbaiti for Plaintiffs. Evidentiary hearing (appendices). Court announced it will recommend denial to District Court. Court is working on Report & Recommendation.)). Transcript to be made available to the public on 05/22/2023. (Patel, Dipti)</p>

Dated: July 14, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was filed electronically through the Court's ECF system, which provides notice to all parties of interest, on this 14th day of July, 2023.

/s/ Mazin A. Sbaiti

Mazin A. Sbaiti

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS (DALLAS)

IN RE:	.	Case No. 19-34054-11 (SGJ)
	.	
HIGHLAND CAPITAL	.	Earle Cabell Federal Building
MANAGEMENT, L.P.,	.	1100 Commerce Street
	.	Dallas, Texas 75242
	.	
Debtor.	.	
.	
	.	Adv. No. 21-03067-11 (SGJ)
CHARITABLE DAF FUND,	.	
LP, <i>ET AL.</i> ,	.	
	.	
Plaintiffs,	.	
	.	
v.	.	
	.	
HIGHLAND CAPITAL,	.	
MANAGEMENT, L.P., <i>ET AL.</i> ,	.	
	.	
Defendants.	.	Wednesday, January 25, 2023
.	1:38 p.m.

TRANSCRIPT OF HEARING ON DEFENDANT HIGHLAND CAPITAL MANAGEMENT
L.P.'S RENEWED MOTION TO DISMISS COMPLAINT (122) AND
STATUS CONFERENCE RE: MOTION FOR WITHDRAWAL OF REFERENCE FILED
BY PLAINTIFF CLO HOLDCO, LTD., PLAINTIFF CHARITABLE DAF FUND,
LP (128)

BEFORE THE HONORABLE STACEY G. JERNIGAN
UNITED STATES BANKRUPTCY COURT CHIEF JUDGE

APPEARANCES ON NEXT PAGE.

Audio Operator: Michael F. Edmond

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ID EVD

Motion for withdrawal of reference filed by
Plaintiff CLO Holdco, Ltd., Plaintiff Charitable
DAF Fund, LP (128)

FOR THE PLAINTIFFS:
(None)

FOR THE DEFENDANTS:

1 through 6 31 31

Defendant Highland Capital Management, L.P.'s
Renewed Motion to Dismiss Complaint (122)
DAF Fund, LP (128)

FOR THE PLAINTIFFS:
(None)

FOR THE DEFENDANTS:

1 through 14 58 58

1 (Proceedings commenced at 1:38 p.m.)

2 THE COURT: All right. We have settings this
3 afternoon in Highland Adversary 21-3067. We have a renewed
4 motion to withdraw the reference set for status conference and
5 a renewed Rule 12(b)(6) motion to dismiss.

6 So let's get all of our appearances from the lawyers
7 before we get started. I'll start with our plaintiffs. Who do
8 we have appearing for Charitable DAF and CLO Holdco?

9 MR. SBAITI: Your Honor, this is Mazin Sbaiti on
10 behalf of the two plaintiffs.

11 THE COURT: Thank you.

12 Any other lawyer appearances for plaintiffs?

13 MR. PHILLIPS: Your Honor, Louis N. Phillips on -- I
14 have been asked and agreed to argue the motion to withdraw
15 reference. I did not file a special appearance. We've talked
16 with opposing counsel, and they were aware that I was involved.
17 I am not counsel of record in the lawsuit, but I've been asked
18 to argue this, the bulk of the motion to withdraw reference.

19 THE COURT: All right.

20 Appearing for defendants, who will appear today?

21 MR. MORRIS: Good afternoon, Your Honor. This is
22 John Morris from Pachulski Stang Ziehl & Jones. I'll be
23 arguing if Your Honor chooses to hear the renewed motion to
24 dismiss. I'm joined by my colleague Gregory Demo. Mr. Demo is
25 going to argue on behalf of defendants and our position the

1 motion to withdraw the reference.

2 I would note just procedurally while we have
3 absolutely no objection to Mr. Phillips participating today, he
4 really should be making an appearance on behalf of the entity
5 making the motion. I don't see how he can bind the plaintiffs
6 without serving as their counsel.

7 I've never heard that before. That wasn't my
8 understanding of what was happening. But, you know, given some
9 of the things that have happened in this case, I think it would
10 be prudent to make sure that the person who's advocating on
11 behalf of a party actually represents them.

12 THE COURT: Okay. We'll circle back to that. But
13 have I missed any lawyer appearances?

14 (No audible response)

15 THE COURT: All right. Others --

16 MR. MORRIS: Not for the defendants, Your Honor.

17 THE COURT: Just observers.

18 All right. Well, Mr. Phillips, let's be crystal
19 clear. I know that during the underlying bankruptcy case you
20 have, if not this adversary, you have appeared for the
21 Charitable DAF.

22 Exactly let's be clear, you know, you said your role,
23 you've been asked to argue the motion to withdraw th reference.
24 Are you retained by Charitable DAF and CLO Holdco in connection
25 with this adversary?

1 MR. PHILLIPS: Your Honor, I have and I will -- we
2 will file in today a notice of appearance. And I'm assuming
3 that will be satisfactory, and we will provide any limitations
4 on our representation. But we are authorized to represent the
5 plaintiff CLO Holdco and the plaintiffs in this matter with
6 respect to the motion to withdraw reference.

7 THE COURT: All right.

8 MR. PHILLIPS: And we will file a formal notice of
9 appearance to that effect.

10 THE COURT: Okay. So we will look for that to
11 happen.

12 All right. We're going to take up the motion to
13 withdraw the reference now. Just as a reminder, my courtroom
14 deputy was in communication with the lawyers and I think the
15 lawyers agreed to 15 minutes each as far as your arguments on
16 the motion to withdraw the reference.

17 Are we all on the same page on that?

18 MR. MORRIS: It's 25.

19 THE COURT: Twenty-five.

20 MR. MORRIS: Correct.

21 THE COURT: Okay. That as wishful thinking maybe on
22 my part.

23 Okay, 25 minutes each. And so I will hear from you,
24 Mr. Phillips.

25 MR. PHILLIPS: Okay. Thank you, Your Honor.

1 As an introductory matter, we discussed with Mr. Demo
2 and Mr. Morris. We have a peculiar situation here where we
3 have a motion to dismiss that calls into question the claims
4 arising under federal law. And that argument dovetails almost
5 completely with the argument about the consideration of federal
6 law.

7 And we have agreed that I will defer -- I will grant,
8 carve out some of the 25 minutes so that Mr. Sbaiti who is
9 going to be arguing the motion to dismiss can argue the
10 intricacies of the claim with respect to federal law.

11 THE COURT: Okay.

12 MR. PHILLIPS: Thank you, Your Honor.

13 Louis M. Phillips on behalf of the plaintiffs.

14 We're here on what's been deemed a re-urged motion
15 for withdrawal of reference. We have a response that the
16 withdrawal of reference on multiple grounds, pretty much all
17 the grounds they could oppose. And we'll start with what I
18 think would be kind of a clearing mechanism. We have arguments
19 on both sides about various and sundry approaches to whether or
20 not the reference should be withdrawn. And it seems to me like
21 some of those arguments may not necessarily be relevant.

22 And what I'm talking about is there's an argument,
23 both sides, about the nature of the jurisdiction core versus
24 non-core, whether or not this is an administrative expense
25 claim which is core, whether or not the Court has jurisdiction

1 pointing out that courts have jurisdiction to decide securities
2 law matters certainly, including 5.3(a)(19). We think the
3 following with respect to all of this.

4 Number one, the structure of -- this is a mandatory
5 withdrawal motion. The structure of 157(d) is that motions
6 that the court shall -- the district court shall withdraw upon
7 a timely motion a proceeding that requires for resolution
8 consideration of both Title 11 and other laws of the United
9 States for regulatory organization of activities affecting
10 interstate commerce.

11 So what we have here is a question of authority. as
12 I see it, and as we argue, the withdrawal of reference is
13 compelled upon a timely motion, not with respect to -- not
14 considering whether or not the proceeding is core because core
15 proceedings can be withdrawn, not considering whether or not
16 the proceeding is an administrative expense claim or proceeding
17 because administrative expense claim proceedings if they meet
18 the statutory definition of a proceeding subject to mandatory
19 withdrawal can be withdrawn. In fact, we've got a citation
20 later on in the argument where there's a proof of claim that is
21 subject to mandatory withdrawal.

22 We've seen this -- the point is the question of
23 whether -- there's no question about the Court having
24 jurisdiction. If this was a matter of subject matter
25 jurisdiction, then you couldn't waive subject matter

1 jurisdiction by failing to file a timely motion. And clearly,
2 the jurisdiction of the district court under 1334 is referred
3 to the bankruptcy court in the event there is no motion to
4 withdraw reference.

5 So our position here in argument and before the Court
6 is that the question is not whether the Court has jurisdiction,
7 what the nature of the proceeding is, is it an administrative
8 expense proceeding, is it an adversary proceeding. It's not
9 whether the Court is capable of deciding this type of issue
10 because clearly the statute provides that, number one, the
11 Court has authority to decide the proceeding if there's no
12 motion to withdraw reference and if it's not related to. And
13 if it is related to and there's consent, you have authority to
14 decide the proceeding.

15 So the question is whether or not the Court,
16 notwithstanding its authority, notwithstanding the fact that
17 the proceeding might be a core proceeding, has to recommend to
18 the district court or the district court has to withdraw the
19 reference under mandatory withdrawal Section 157(d). So --

20 THE COURT: Okay. Let me --

21 MR. PHILLIPS: -- I think what we can do --

22 THE COURT: Let me call time out and my law clerk
23 will stop the timer --

24 MR. PHILLIPS: Yes, ma'am.

25 THE COURT: -- when I interrupt with questions.

1 So we're on the same page, I think I hear you saying
2 you don't dispute that this is a core in nature proceeding,
3 that it's essentially a request for allowance of an
4 administrative expense claim and even if those involve federal
5 law or non-bankruptcy law, that's core.

6 What you're saying is sometimes even when you have a
7 core matter, whether it's a proof of claim or a request for
8 administrative expense claim, if it involves I guess a
9 significant enough amount of federal law, 157(d) requires it to
10 be yanked from the bankruptcy court?

11 MR. PHILLIPS: Well, it would be 157(d) would deal
12 with a certain type of federal law, consideration of federal
13 law or an organization and activity involving the regulation of
14 interstate commerce. So it's not federal law --

15 THE COURT: Okay. But I want to make sure I have an
16 answer from you because district courts like you to have
17 certain bells and whistles in your reports and recommendations
18 about is it core or non-core or stern.

19 You acknowledge this is a core matter?

20 MR. PHILLIPS: Your Honor, what I would rather do if
21 tied to the stake, I might approach this in a different manner.
22 And if you want to tie me to the stake, I might have to. But
23 what I would rather do is tell the Court that I don't think --
24 I hear the Court with respect to what the district court might
25 want as regards to whether it's core or non-core.

1 But what I would rather do at this point, I don't
2 have authority to admit or acknowledge. What I would rather
3 acknowledge is that I don't think it's relevant to the question
4 of whether a proceeding gets withdrawn under mandatory
5 abstention because --

6 THE COURT: Okay.

7 MR. PHILLIPS: -- the proceeding, the definition of a
8 proceeding that's subject to mandatory abstention has no
9 reference to core, non-core, or related to. It is just a
10 proceeding. And it clearly is subject to 1334 jurisdiction but
11 this is one provision of Section 157 that does not deal with
12 whether or not a proceeding is core, non-core, arising in,
13 arising under, related to.

14 It's just a proceeding with the assumption that you
15 have jurisdiction under 1334, an assumption that it got
16 referred to the bankruptcy court because of the order of
17 reference and 157 that authorizes reference of matters arising
18 in, arising under, or related to a bankruptcy case to the
19 bankruptcy court.

20 My position is that it's not relevant to whether or
21 not it is core, non-core --

22 THE COURT: Okay.

23 MR. PHILLIPS: -- related to because the statute
24 simply refers to the type of proceeding and its involvement
25 with a certain component of federal law.

1 THE COURT: Okay. We've started the timer again.

2 MR. PHILLIPS: So -- okay, thank you.

3 I've got my own little timer but, of course, my phone
4 goes off and then I have to find it and if the Court could just
5 tell me when I -- I'd like to reserve five minutes. If the
6 Court could tell me when I'm at ten minutes, I'd appreciate it.

7 THE COURT: Okay.

8 MR. PHILLIPS: So where I think we --

9 THE COURT: When you are at ten minutes left. Okay,
10 go ahead.

11 MR. PHILLIPS: Where I think we were, Your Honor, is
12 that we have a motion to withdraw reference that was originally
13 filed in the district court. I think there are two questions
14 here. I think the questions are not -- the questions are
15 whether or not this is a timely motion and, secondly, whether
16 or not the requirements of 157(b) are met with respect to the
17 nature of the proceeding and the involvement of federal law
18 regulating activities or organizations under -- involving
19 interstate commerce. That's what I think we're here to
20 discuss.

21 And so with respect to timeliness, we have a motion
22 filed in the district court. We have a motion to enforce the
23 reference under the local order of reference. And we have a
24 cross-motion that says to the district court don't do that
25 because it's not efficient. You ought to go ahead and just

1 keep it and, quote, withdraw the reference because this is a
2 157(d) type proceeding.

3 I think what happened and what we have in the
4 district court's order of reference is no resolution of the
5 motion to withdraw reference. It's simple an order enforcing
6 local order of reference that applies to all proceedings.

7 So I guess the way I look at this, the way I approach
8 -- I'm arguing to the Court that this should be approached is
9 that you can't withdraw reference of a proceeding unless the
10 order of reference is complied with. And I can see how the
11 district court would say I am not -- we are not going to abide
12 by litigants that file -- we are not going to grant relief
13 because it's efficient in the face of a proceeding
14 automatically referred to the bankruptcy court that should have
15 been filed in the bankruptcy court but was not.

16 And if you look at the order of reference, the order
17 of reference simply says that the matter is referred under the
18 local -- under the order of reference and is to be treated as a
19 proceeding related to the bankruptcy case below and given an
20 adversary proceeding number. There's no ruling on the question
21 of whether or not mandatory abstention applies because I think
22 what we're dealing with here, in fact, I know what we're
23 dealing with here.

24 We're dealing with a situation where the district
25 court considered any withdrawal of reference to be premature

1 because the order of reference in its mind needed to be
2 enforced so that the proceeding was in the bankruptcy court
3 prior to the ruling on, filing of, or consideration of a motion
4 to withdraw the reference.

5 THE COURT: Okay. Let me stop you again there.

6 MR. PHILLIPS: So our position is --

7 THE COURT: Let me stop you again there because --

8 MR. PHILLIPS: Yes, ma'am.

9 THE COURT: -- before I started preparing for today's
10 argument, I had wrongly had in my head that Judge Boyle, the
11 district judge just sua sponte did a one-paragraph order
12 sending this lawsuit to the bankruptcy court. But then as I
13 started preparing, I either was reminded --

14 MR. PHILLIPS: Yes, ma'am.

15 THE COURT: -- or realized for the first time that
16 the debtor, defendants, filed a motion to enforce the reference
17 arguing, please send this to the bankruptcy court. And your
18 clients opposed that and essentially made a cross-motion to
19 keep the case.

20 And so the district judge's short little order was
21 actually -- it wasn't sua sponte, it was after presumably
22 reading everybody's pleadings, right?

23 MR. PHILLIPS: Agreed. I don't think I argued that
24 it was a sua sponte order. I did not do that, no. It was --

25 THE COURT: Well, no. I point that out because I

1 think the argument was essentially no motion to withdraw the
2 reference even though this is called renewed was really fully
3 made and considered by the district court. Was that not what
4 you were arguing?

5 MR. PHILLIPS: I agreed that that's correct. I
6 agreed that that's my argument. And the reason that's my
7 argument is you don't have to rule and in fact the district
8 court -- I'm not going to say the district court was wrong
9 because if the district court made a decision that the order of
10 reference, that the plaintiff did not comply with the order of
11 reference, then trying to short-circuit the order of reference
12 by filing in the district court.

13 The court didn't have to, and this is not something
14 that had to be litigated to decide whether or not to refer in
15 accordance with the order of reference because technically I'm
16 not sure that the district court could have concluded that the
17 order of reference could be withdrawn before it was complied
18 with. So I don't -- I think what we're -- we're not talking
19 about a collateral estoppel or res judicata on the motion to
20 withdraw reference because it was not necessary even to address
21 the motion to withdraw reference before ordering enforcement of
22 the reference.

23 So I'm not saying it was sua sponte. I'm not saying
24 that the plaintiff who I represent in connection with this
25 argument didn't say keep it, but the plaintiffs' argument about

1 keeping it was you might as well keep it because of efficiency.
2 And the district court in our estimate made the determination
3 that we don't care about efficiency. We have an order of
4 reference that needs to be complied with as an initial
5 gatekeeper issue. If you don't comply with the order of
6 reference and file up here, we're going to make sure you start
7 at a right place by ordering the enforcement of the reference.

8 I don't think you have to -- I know you don't. The
9 district court didn't have to get to the issue of whether or
10 not the reference would be withdrawn on a mandatory withdrawal
11 under 157(d) to order compliance with the reference. In other
12 words, you can't refer what's not -- you can't withdraw what's
13 not heard. And I think that's what happened. We're arguing
14 that that is what the district court did.

15 THE COURT: Well, let me stop you again. We're going
16 to be here a long time today, I fear. Did you argue back at
17 that stage you can't send it to the bankruptcy court, Judge
18 Boyle, this involves material consideration of other federal
19 laws affecting interstate commerce, you can't do it. And she,
20 nevertheless, did it?

21 MR. PHILLIPS: No, I think the argument -- I mean I
22 didn't write the brief. I didn't -- I don't think there was an
23 argument, frankly. In the brief, as I read it, it was this
24 matter is subject to mandatory withdrawal. And it makes no
25 sense to order the reference just so we would then bring it and

1 try to bring it back.

2 So I don't think that -- even if -- and I'll tell you
3 that even if the plaintiff argued you can't do it, it's clear
4 to me that the -- it's clear that under the order of reference,
5 that the district court could absolutely have just said I'm not
6 listening to any of this. I'm ordering the reference and
7 that's what I'm doing.

8 But there was never in the order that was issued by
9 the district court a ruling on mandatory withdrawal. Why?
10 Because the district court's concern was that the reference had
11 not been complied with. And so I don't think we're talking
12 about something that had to be actually litigated to get to the
13 district court decision that the order of reference needs to be
14 complied with and this needs to be given an adversary number.
15 Why? That's what our automatic reference requires.

16 What we don't want at the district court is litigants
17 deciding we don't have to comply with the order of reference
18 because it's going to be withdrawn anyway. And I think, Judge,
19 if you look at what the district court did, it did not mention
20 any type of withdrawal ruling. It did not mention any analysis
21 of the nature of the proceeding. I'm not sure it even knew
22 what the proceeding was.

23 I think what it did was exactly what the defendant
24 asked it to do was enforce the reference, which it could do and
25 did do without consideration of the premature request in its

1 mind that the reference be withdrawn as a mandatory withdrawal
2 under 157(d).

3 THE COURT: Okay.

4 MR. PHILLIPS: That's our position.

5 THE COURT: All right. Does that conclude your
6 argument?

7 MR. PHILLIPS: No, ma'am. We have to address
8 timeliness, and we have to address --

9 THE COURT: Okay.

10 MR. PHILLIPS: So the timeliness issue is that this
11 Court, the reference was not enforced. The proceeding came to
12 this Court, and the defendants raised dismissal and basically
13 raised dismissal on the basis that everything raised in the
14 complaint was actually litigated or determined either through
15 the doctrine of res judicata or collateral estoppel and/or was
16 precluded by judicial estoppel.

17 None of -- those issues were not issues of the type
18 of federal law that is applicable to 157(d). Those issues are
19 preclusion issues: res judicata, collateral estoppel. This
20 Court ruled 100 percent on collateral estoppel and res judicata
21 and judicial estoppel and dismissed the complaint with
22 prejudice.

23 In the November hearing, this Court advised the
24 parties that it was in essence sitting as the magistrate and
25 would be writing up a recommendation.

1 "I'm essentially acting as a magistrate for Judge
2 Boyle in this action and whichever way I go and
3 whichever theories I think she would expect a
4 thorough write-up. It would of course be in the form
5 of a report and recommendation. for her to either
6 adopt or, if not" --

7 THE COURT: Can I stop you?

8 MR. PHILLIPS: Yes.

9 THE COURT: Did I later correct myself at some point
10 and go, oh wait, she referred this to me? I thought at one
11 point I misspoke and then later in open court corrected myself?
12 Did I -- am I wrong?

13 MR. PHILLIPS: Your Honor, I will look again.

14 THE COURT: Okay.

15 MR. PHILLIPS: We'll look again.

16 THE COURT: Okay. I --

17 MR. PHILLIPS: But --

18 THE COURT: Go ahead.

19 MR. PHILLIPS: But I will say this. I will say this,
20 we are faced with and we have to argue about and we're dealing
21 with a final order. The Court issued a final order, and the
22 plaintiff appealed.

23 So there's no question that the Court, whether or not
24 it advised the parties, it made the decision to issue a final
25 order. And that order was appealed. So there's no question,

1 we're not challenging the fact that the Court issued a final
2 order. The Court did. And the final order went to the Court
3 of Appeals, and it took time at the Court of Appeals to issue a
4 ruling.

5 And the ruling was that collateral estoppel/res
6 judicata did not apply because of the actual litigation
7 requirement given the difference in burdens of proof and
8 standards of proof; and, secondly, that there was one of the
9 components of judicial estoppel that was not resolved by the
10 Court with respect to the request to dismiss Counts 2 and 5
11 through judicial estoppel.

12 So the matter was sent back to Your Honor. And a
13 motion to dismiss was filed that focuses, re-urges judicial
14 estoppel on Counts 2 and 5 and focuses on the substantive
15 nature of the complaint and kind of a pure failure to state a
16 claim under Rule 12 which involves the substantive nature of
17 the claim.

18 And so what in the answer, in the response to the
19 motion to dismiss, there was a motion to re-urge or renew the
20 motion to withdraw reference. Now that the substantive
21 nature of the claim is put at issue by a motion to dismiss,
22 because there's no preclusion -- there is a preclusion argument
23 on Counts 2 and 5, there's no preclusion argument on res
24 judicata or collateral estoppel.

25 The motion to withdraw reference was re-urged, and we

1 don't think that was a surprise to anybody. In fact, in
2 November of '21, counsel for the defendants was suggesting that
3 a motion to withdraw reference was coming and it would be
4 sanctionable, et cetera, et cetera. We don't think it's
5 sanctionable, clearly, or it wouldn't have been brought.

6 But we now have the substantive issues in the
7 complaint being put to the test by a motion to dismiss. And at
8 this point, we think it's ripe for motion to withdraw
9 reference. And we also --

10 THE COURT: This is your ten-minute warning.

11 MR. PHILLIPS: -- would point out that --

12 THE COURT: This is your ten-minute warning --

13 MR. PHILLIPS: Okay, thank you.

14 THE COURT: -- you asked for.

15 MR. PHILLIPS: Yes, thank you very much, Judge.

16 We'd point out that there are -- you know, this court
17 and other courts take the position that -- some courts take the
18 position motions to withdraw reference are premature until and
19 unless there's a jury trial or a trial that the matters are
20 trial-ready. In fact, I think in the Curson (phonetic)
21 litigation, you have recommended withdrawal of reference but
22 not until it's trial-ready, although those were motions to
23 withdraw reference up at front.

24 But we'd point out In re Reed. We cited -- we'd
25 point out In re Reed, 2017 WL 1788295, which deals with a

1 prematurity finding by the court pending jury trial readiness.

2 And we also look at National Gypsum, 145 B.R.
3 539,542, which is a Judge Fish case. And in that case, you had
4 an objection to a proof of claim and a subject judgment on the
5 proof of claim. I don't really understand that, but the
6 respondent to the summary judgment waited until that was filed
7 to bring a motion to withdraw reference because the summary
8 judgment had raised the issue of antitrust law. And Judge Fish
9 said that this was -- notwithstanding this was late into the
10 case, that the motion to withdraw reference would have been
11 premature prior to that.

12 We understand -- we think this is a very closely
13 analogous case and that the question of the substantive nature
14 of the cause of action and the causes of action are now
15 squarely before the Court which generates a motion to withdraw
16 reference where when we're talking basically about preclusion,
17 that wasn't necessarily -- this is the better time to bring it
18 than that time was.

19 Finally, I would say there's an allegation of
20 prejudice. Everything's been briefed. The only question in
21 our mind is whether the Court issues a final order or proposed
22 findings and conclusions so no party is prejudiced. The Court
23 will either do one or the other based on the briefing that's
24 before the Court.

25 So I'll use the rest of my 20 minutes to defer to Mr.

1 Sbaiti about the applicability of federal law and the intricacy
2 of federal law and necessity of dealing with federal law.

3 THE COURT: Okay. Mr. Sbaiti?

4 MR. SBAITI: Good afternoon, Your Honor.

5 I've prepared some remarks for the actual motion to
6 dismiss, and so if it's okay, I'd like to just go through just
7 the legal portions and then I'll save the actual motion to
8 dismiss arguments for my time during the motion to dismiss. Is
9 that okay?

10 THE COURT: Okay.

11 MR. SBAITI: Your Honor, so the main federal statute
12 or the federal statute that we're dealing with here is the
13 Advisers Act, as Your Honor knows. When we first filed this
14 case, the core allegations or principal allegation was that
15 Highland breached the Advisers Act by -- well, several sections
16 of the Advisers Act by essentially cherry-picking a provision,
17 an opportunity to buy the HarbourVest, the HarbourVest interest
18 in HCLOF.

19 And it does so essentially by making a statement
20 about the value of the HarbourVest, the interest, and then
21 using its position as both a principal and as an adviser in the
22 HarbourVest business in order to accomplish that. Section 206
23 of the Advisers Act establishes fiduciary duties. The Supreme
24 Court in Transamerica Mortgage Advisers v. Lewis, 444 U.S.
25 11,17, held that Section 206 imposes federal fiduciary

1 standards to govern the conduct of investment advisers. And
2 the -- if you actually look at Mr. Seery's appointment hearing
3 in July of 2020, he admitted that the Investment Advisers Act
4 puts a fiduciary duty on Highland Capital to discharge its duty
5 to the investors.

6 And that language that he used I think is going to be
7 important later on when we talk about whether there is a direct
8 fiduciary duty owed by Highland to Holdco, for example, as an
9 investor in HCLOF.

10 I'd like to focus specifically, Your Honor, on
11 Section 206(4) of the Advisers Act which says it's unlawful to
12 directly or indirectly engage in any practice or act in the
13 course of business which is fraudulent, deceptive, or
14 manipulative. Some of the cases cited by the other side tend
15 to argue that, no, there's only a direct fiduciary duty to a
16 client. The language that they refer to or the cases they're
17 referring to are usually citing the language in Section 206(1)
18 or Section 206(2), indeed, do discuss the duties directly owed
19 to a client. Section 206(4) has no such limitation.

20 The next point about that issue, Your Honor, is
21 Section 206(4) also gave the SEC the power to explain the scope
22 of what 206(4) means. And they cast a rule, 206(4)-8, which
23 Your Honor can find at 17 CFR 275.206(4)-8. And it
24 specifically says that an investment adviser shall not make any
25 untrue statement of material fact or admit to state a material

1 fact necessary to make the statements made not misleading to
2 any investor or prospective investor in a pool investment fund,
3 which HCLOF is.

4 And it also prohibits them from otherwise engaging in
5 any act, practice, or course of business that is fraudulent,
6 deceptive, or manipulative with respect to any investor in such
7 a fund.

8 Our argument has been the premise of the complaint --
9 and this rule is cited in the breach of fiduciary duty claim in
10 the complaint. The premise of the complaint is that these
11 (indiscernible) fiduciary duties that Highland had to abide by,
12 and those fiduciary duties can be broken down into a couple
13 that are relevant for us here.

14 The first one is, is there's a fiduciary duty of care
15 which ports, for example, SEC v. Tambone which we cite in our
16 brief, 550 F.3d 106, says the Advisers Act imposes a fiduciary
17 duty to act at all times in the best interest of the fund and
18 its advisers. There's also a duty of care which we -- excuse
19 me, a duty of loyalty, and we cite several cases on that.

20 And one example is SEC v. Word Tree Financial, which
21 is a Fifth Circuit case, 43 F. 4th 448,460. And there, the
22 Fifth Circuit held that because cherry-picking involves
23 allocating more profitable trades to certain accounts, an
24 adviser is stealing from one customer to enrich himself when
25 they engage in cherry-picking.

1 And in that case, an advisor was cherry-picking
2 between one customer and sending the opportunity to another
3 customer. Here, it's worse. Here the --

4 THE COURT: Okay. I'm going to --

5 MR. SBAITI: -- adviser is sending the --

6 THE COURT: I'm going to interrupt again. You did --

7 MS. SBAITI: Yes, Your Honor.

8 THE COURT: -- foreshadow that your argument might
9 overlap a little with the motion to dismiss argument.

10 MS. SBAITI: Yes.

11 THE COURT: I really want to hear why 28 U.S.C.
12 157(d) is triggered here. And I'm going to give you a "for
13 example." This court --

14 MS. SBAITI: Okay.

15 THE COURT: -- other bankruptcy courts get proofs of
16 claim, claims made against the estate that involve other
17 federal law and certainly state law all the time.

18 The most readily -- the example that most readily
19 comes to mind is employee WARN Act claims, okay. We see them
20 sometimes in large Chapter 11s where employees were laid off,
21 didn't get the 60 days' notice that the WARN Act contemplated,
22 so under Fair Labor Standards Act, we think we're entitled to X
23 amount of claim.

24 No one ever asks for those to be sent to the district
25 court. Well, I mean maybe here have been before, but my point

1 is we try things in this Court involving other federal law
2 fairly often. What makes your situation different? What is so
3 hard or beyond what bankruptcy courts should do about your
4 claims if they go forward?

5 MS. SBAITI: Your Honor --

6 MR. PHILLIPS: Your Honor, if I --

7 MR. SBAITI: Yeah, I was going to ask Mr. -- the
8 bankruptcy attorney to --

9 MR. PHILLIPS: Your Honor, I just want to -- we
10 agreed --

11 THE COURT: Well, no, no, no.

12 MR. PHILLIPS: We agreed --

13 THE COURT: I had understood that Mr. Sbaiti was
14 going to address the federal law --

15 MR. PHILLIPS: Okay.

16 THE COURT: -- in more in depth. And so I'm hearing
17 some explanations of the claims, but I'm not really hearing him
18 zero in on what is significant about these claims or so
19 significant that 157(d) is triggered. So Mr --

20 MS. SBAITI: Your Honor, if I may, I would -- sorry,
21 am I on mute?

22 MR. PHILLIPS: No. You're -- we can hear you.

23 MR. SBAITI: Can you hear me?

24 Okay. Your Honor, I would have two points to make,
25 Your Honor. Number one, I don't know much about the WARN Act.

1 I do know that the Advisers Act is one of the statutes that is
2 not as highly litigated as an employment statute. And so while
3 there is case law to support the general proposition --

4 THE COURT: Well, and the argument is because it
5 doesn't give a private right of action is what I hear the other
6 side saying.

7 MS. SBAITI: And that was where I was going is they
8 now are citing cases in their reply that says, well, there's no
9 private right of action, at least their reply to the motion to
10 dismiss. You know, and I'm assuming that's what they've argued
11 in the motion to withdraw reference is that there's not private
12 right of action under Section 215.

13 Well, that kind of -- obviously, we disagree with
14 that because the Supreme Court in Transamerica specifically
15 said there is a private right of action. It's a private right
16 of action for rescission and there's a private right of action
17 for what the Supreme Court called the incidence of voidness.

18 Section 215 does two things. It makes void any
19 contract that requires someone to waive any rights or
20 obligations under the Advisers Act. And Section 215 also voids
21 the rights of anybody who performed a contract in violation of
22 the Advisers Act. Now the precise scope of that hasn't been
23 heavily litigated and it's -- you know, these are broad
24 principles.

25 And, in fact, in the reply to the motion to dismiss,

1 they bring up a case pending in New York where a court there,
2 although against the overwhelming weight of authority said,
3 well, Section 215 only applies when you have a contract that
4 facially requires someone to violate the Advisers Act or which
5 was made in violation of the Advisers Act.

6 But we argue that the settlement was made in
7 violation of the Advisers Act because it was made as part of a
8 way -- a part of a self-dealing scheme. But the intricacies of
9 that law and the background and the underlying rules and
10 regulations that go into that that we claim violated I think
11 are not -- I don't know that 157 is a sort of court-competency
12 issue.

13 The way I've always understood it to be is, you know,
14 when there's an Article III court deciding these types of
15 things and there's going to be a jury, that's where this is
16 supposed to go. I would defer to the bankruptcy experts to
17 correct me on that. But that is how I've always understood the
18 position that -- on the bankruptcy issue on mandatory
19 withdrawal to be.

20 THE COURT: All right. Anything else?

21 MS. SBAITI: Your Honor, I'll just hit the actual
22 causes of action issue and get them (indiscernible) on the
23 motion to dismiss if that's okay with Your Honor. I hope we
24 gave Your Honor a flavor of the federal law issues that are
25 very much at play here.

1 THE COURT: Okay. Yeah, just to be clear, you have
2 one more minute so.

3 MR. SBAITI: Oh, I'll kick it back to Mr. Phillips.

4 THE COURT: Okay.

5 MR. PHILLIPS: We just have one more minute out of
6 the 25?

7 THE CLERK: Yes, Your Honor.

8 THE COURT: Yes.

9 MR. PHILLIPS: Okay. I'll reserve one minute, Your
10 Honor, for rebuttal.

11 THE COURT: Okay.

12 Mr. Demo?

13 MR. DEMO: (Clears throat). Excuse me.

14 Yes, Your Honor. Greg Demo for the record, Pachulski
15 Stang Ziehl & Jones, on behalf of Highland Capital Management.

16 That's a lot to unpack, Your Honor, mostly because
17 most of it is factually inaccurate. And I'll go through why
18 it's factually inaccurate in a minute. But as we go through
19 this -- oh, I'm sorry, Your Honor. Before I start, can I do
20 our exhibits?

21 THE COURT: All right. So you have exhibits on a
22 motion to withdraw the reference?

23 MR. DEMO: We do, Your Honor. And they're at Docket
24 Number 146. There are six exhibits. Five of them are just
25 cases that are either on your docket in the Acis bankruptcy or

1 on the docket. Two of them are SEC guidance. We think Your
2 Honor can just take judicial notice of those.

3 The last which is Exhibit 3 is the investment
4 management agreement between Highland Capital Management and
5 the DAF. I did talk to Mr. Phillips before we started, and he
6 said he had no objection to these being entered.

7 THE COURT: All right.

8 MR. PHILLIPS: Correct. Correct.

9 THE COURT: Then I'll admit them. I'll admit them.

10 (Defendant's Exhibits 1 through 6 admitted into evidence)

11 MR. DEMO: Okay. Thank you, Your Honor. And
12 apologies for that aside.

13 But going back and, again, I'll unpack these facts,
14 you know, as we go through. But the one thing that I'd ask
15 Your Honor to keep in mind as we go through this is that Your
16 Honor has actually already adjudicated this issue. In November
17 of 2023 [sic], Highland filed a substantially similar motion to
18 dismiss. All parties fully briefed that motion to dismiss. On
19 November 23, 2021, all parties argued the merits of that motion
20 to dismiss including the Investment Advisers Act in this court.

21 In March of 2022, Your Honor entered a final order on
22 that motion to dismiss which again is substantially the same as
23 what we're here on today. But we're still here today because
24 plaintiffs are asking you to withdraw the reference on a motion
25 to dismiss that Your Honor has already heard and entered a

1 final order on.

2 I would ask Your Honor just keep that in your mind,
3 keep the absurdity of that in your mind as I walk through the
4 rest of this case because I am going to have a timeline as I
5 normally do. But before we get to that timeline, Your Honor,
6 you've heard plaintiffs' arguments, and their argument boils
7 down to mandatory withdrawal is required because the Investment
8 Advisers Act is somehow implicated.

9 And now plaintiffs also had an argument that
10 mandatory withdrawal is somehow required because this was a
11 non-core proceeding barely even related to this. Now they've
12 backed off that second argument, Your Honor, and I thin they've
13 done it tactically because they don't want to admit it. Mr.
14 Phillips said he couldn't admit to Your Honor that this is a
15 core proceeding.

16 And while we agree that in terms of Section or 28
17 U.S.C. 157(d) that that is not entirely relevant. Your Honor
18 can withdraw or a core proceeding can be referenced and
19 withdrawn in that case. But because it's a core proceeding,
20 and I'll get to this at the end if Your Honor wants me to go
21 once again in the Supreme Court's Reading (phonetic) case, and
22 this is, claims allowance, equitable jurisdiction of an
23 administrative expense claim, Your Honor can enter final
24 orders, which you just heard Mr. Sbaiti said that, well, maybe
25 you shouldn't do it, and there is no jury trial right.

1 And so while again we believe that there's limited
2 relevance to the motion to withdraw the reference, it is an
3 extremely important issue that plaintiffs put into relevance
4 and now are (indiscernible). And now going -- and Ms. Canti
5 (phonetic), can you please put up Slide 1 -- going to the text
6 of 28 U.S.C. 157(d). And this is the text that we all know
7 well. And when it comes up on the screen, you'll see it. It's
8 really the second section of 157(d) that governs mandatory
9 withdrawal of the reference.

10 And there are two elements to that. The first
11 element is timeliness, if a movant -- not this court, but if a
12 movant does not file a timely motion, there can be no mandatory
13 withdrawal. The second element assumes that a timely motion
14 has been filed and requires mandatory withdrawal only if
15 there's substantial consideration, and that's the case law of a
16 non-bankruptcy federal law.

17 Neither of those two elements are met here, Your
18 Honor. And in terms of timeliness, we take fresh approaches in
19 our case, our papers and we cite other case. And for the
20 purpose of timeliness, a movant is supposed to file a motion to
21 withdraw a reference as soon as it becomes apparent that there
22 is going to be issues that must be adjudicated by the district
23 court. Courts look at that dispositively. If that motion is
24 not timely filed, there is no withdrawal of the reference under
25 157(d).

1 But there's more, Your Honor, and again, we cite
2 these cases. If the motion to withdraw the reference seems to
3 be forum-shopping, that goes into the timeliness requirement.
4 If the motion to withdraw the reference is prejudicial to a
5 non-movant -- in this case, Highland and its creditors -- that
6 goes to timeliness.

7 All of those elements are present here, Your Honor.
8 Not timely, forum shopping, and it's prejudicial. And this,
9 Your Honor, is where, you know, I want to go through the
10 timeline again because I think the timeline proves our case.
11 And as we go through the timeline, I'll rebut some of the
12 factual misstatements that Mr. Phillips and Mr. Sbaiti made.

13 And, Ms. Canti, if you can go to the next slide,
14 please.

15 As Your Honor knows, this case was started not in
16 this court, notwithstanding the fact that it sought an
17 administrative expense claim, but it was began in district
18 court on April 12th, 2021.

19 And, Ms. Canti, there should be dates up on the top
20 of those slides if you can make sure that those show.

21 The next slide, I'll give you a second to adjust.

22 They're not there, but I can go through the dates,
23 Your Honor. So this is April 12th, 2021. In the next slide is
24 May 19th, 2021. On this date, Highland filed its motion to
25 dismiss their complaint both for failure to state a claim on

1 the merits and pursuant to res judicata. And this complaint --
2 I'm sorry, this motion to dismiss that we filed originally I
3 believe is Docket Number 36 on the docket.

4 And if you just go to the table of contents of that
5 pleading, Your Honor, Article 3, subsection (c) is failure to
6 state a claim. And it's failure to state a claim under RICO.
7 It's failure to state a claim for breach of fiduciary duty.
8 It's failure to state a claim for negligence. It's failure to
9 state a claim for tortious interference. And it's failure to
10 state a claim for breach of contract.

11 And if you go to the back end of that motion to
12 dismiss, Your Honor, you'll see that we argue Transamerica, no
13 private right of action under 206. We argue Goldstein, no
14 fiduciary duty to an investors in a fund. We argue all of the
15 Investment Advisers Act claims that you are going to hear
16 today. That was in our motion to dismiss filed in May of 2021.

17 Ms. Canti, next slide, please.

18 And this is May 27th, 2021, and it's plaintiffs file
19 their response to the motion to enforce the reference. And
20 you've heard a lot of talk about how plaintiffs filed a motion
21 in district court for mandatory withdrawal, and that's the
22 basis for their timeliness argument, Your Honor, is that
23 there's a motion sitting out there somewhere that's never been
24 ruled on.

25 But if you look at this response, and this is the

1 only thing they filed in the district court, it's a response to
2 our paper and in the title, it says "Cross motion to withdraw
3 the reference." There is no stand-alone motion. It was
4 procedurally improper the way they did it, and basically they
5 only made an argument to the district court that mandatory
6 withdrawal of the reference should apply. And that argument is
7 verbatim, nearly verbatim the arguments that you're hearing
8 today. They brought those two in district court.

9 And now you heard Mr. Phillips says things about how,
10 you know, it's just -- there's no thought of judicial economy,
11 right. It's just you enforce the reference and then Your Honor
12 gets to decide whether it would have to bounce it up to the
13 district court. That's just not true, Your Honor.

14 In this motion, plaintiffs cited a case, it's called
15 In re Harrah's Entertainment. They actually cited it in this
16 round of pleadings. And in that case, which was filed in the
17 Eastern District of Louisiana, there was a case filed in the
18 Eastern District of Louisiana, and the question there was
19 whether or not that case should be referred to the bankruptcy
20 court as a related case.

21 A party filed a motion for mandatory withdrawal of
22 the reference in the district court and also a motion for
23 permissive withdrawal again in the district court. The
24 district court denied the motion to enforce and decided that it
25 wouldn't make sense because you would end up having to withdraw

1 the reference anyway. Judicial economy, Your Honor.

2 Plaintiffs cited that case. And they cited that case
3 in this paper that we're talking about now to argue to the
4 district court that it made absolutely no sense to enforce the
5 reference and bring it down here because it would just get
6 roundtrip back and how does that make sense in terms of
7 judicial economy. The exact opposite of what you heard
8 earlier.

9 And I'll also point you to another case they cite,
10 and this is Continental Airlines, which was affirmed by the
11 Fifth Circuit. Substantially similar facts, and in that case,
12 the Southern District of Texas, the district court said, "This
13 court strongly suspect that if it does not withdraw the
14 reference, it will only see this exact same lawsuit again in
15 the future on such a de novo review of a report and
16 recommendation. That duplication of judicial effort would
17 needlessly waste this court's limited resources."

18 The idea -- and again, we'll get to the order that
19 the district court entered, but the ideas that Mr. Phillips put
20 forth in this Court is not borne out by the case law nor are
21 they borne out by what they actually pled.

22 And next slide, please, and I'll move this a little
23 bit faster.

24 June 28th, 2021 -- I'm sorry, we are now in August,
25 Your Honor. And this is plaintiffs' move to stay the

1 complaint. You've heard this one before, arguing they can't be
2 prosecuted because of the plan injunction.

3 Next slide.

4 September 20th, 2021, this is when the district court
5 entered its order referring this case to Your Honor to be
6 adjudicated as -- and there is a typo there -- it just said
7 related to Highland's bankruptcy. Now you just heard me cite
8 Harrah's, you heard me cite their papers. Now did the district
9 court say that this cross-motion, this procedurally improper
10 cross-motion was denied? No, but it enforced the reference
11 notwithstanding plaintiff's arguments that it would aid
12 judicial economy because the reference would have to be
13 withdrawn. They made the exact same arguments that are being
14 made here today.

15 The inference is not what Mr. Phillips said. The
16 inference is that the district court read plaintiffs' papers
17 and said, no, there's no basis for mandatory withdrawal, let's
18 send it to the bankruptcy court where it should have been filed
19 in the first instance.

20 Next slide, please.

21 This is November 8th, 2021. Now this is the first
22 time that plaintiffs indicate in this Court that they think
23 that the reference should be withdrawn, and they did it by
24 attaching a proposed motion to withdraw the reference to a
25 procedurally improper amended motion to stay pending

1 adjudication of the confirmation order in the Fifth Circuit.
2 Again, that motion that they attached was verbatim the
3 arguments they made in the district court and verbatim the
4 arguments that they're making here today.

5 Now it begs the question, Your Honor, why they
6 thought they needed to file a motion to withdraw the reference
7 in this Court in November of 2021 if they already had a motion
8 to withdraw the reference pending when it was referred down to
9 this Court. It makes not sense, Your Honor.

10 Now they've threatened to file that motion if you
11 were to deny the stay. And now -- can we go to the next slide,
12 please?

13 November 23, 2021, Your Honor denied the stay. What
14 did plaintiffs do? I can tell you what they didn't do. They
15 didn't file their motion to withdraw the reference. Again,
16 they argued in the Court the merits of the motion to dismiss
17 including that the Investment Advisers Act claims should be
18 dismissed.

19 Now fast track because there's a fairly large gap
20 between September '21 and November of '21. What happened in
21 that gap? The answer to that, Your Honor, is not that a motion
22 to withdraw the reference was filed. What happened in that gap
23 is that the parties agreed on the November 23rd date to hear
24 both the motion to dismiss and the motion to stay.

25 Next slide, please, Ms. Canti.

1 And this is March 11th, 2022. This is the date that
2 Your Honor entered a final order. All the equivocation about
3 whether you're acting as a magistrate, all of that stuff goes
4 out the window. Your Honor did not enter a report and
5 recommendation to the district court. Your Honor entered a
6 final order, as Your Honor could do because this is a core
7 proceeding.

8 Important to Mr. Phillips' argument is what did this
9 order say. Primarily it dismissed on collateral and res --
10 and, sorry, and judicial estoppel grounds. That's correct.
11 But if you look at the last paragraph of Your Honor's March
12 2022 order, it said that it reviewed all of Highland's other
13 arguments which are the arguments as to why the Investment
14 Advisers Act claims should be dismissed.

15 And Your Honor in March of 2022 in the last paragraph
16 of that order said she was inclined to agree with our arguments
17 on the Investment Advisers Act claims. Your Honor has done
18 this before, yet we're here again today.

19 Next slide, please.

20 Now this is fast forwarding a year. Now we are in
21 September, specifically September 2nd, 2022. This was when the
22 district court remands this back to Your Honor for one finding.
23 But, again, there's a fairly large gap between March of 2022
24 and September of 2022. And so what was happening during that
25 time period? Again, no motion to withdraw the reference was

1 filed.

2 But what was happening is that the parties were fully
3 briefing the merits of your final order on the motion to
4 dismiss to the district court. Plaintiffs at no point during
5 that briefing made reference to a need to withdraw the
6 reference or made reference to the Court's, your inability to
7 enter a final order. September 2nd, 2022.

8 Next slide, please.

9 This is October 14th, 2022. Now this is when
10 Highland filed its renewed motion to dismiss in this Court.
11 Again, there's a month. September, October, no motion to
12 withdraw the reference filed. The motion to dismiss that
13 you'll hear today from Mr. Morris, again, substantially similar
14 to the motion to dismiss that you heard in November of 2021, a
15 year ago.

16 Next slide, please, Ms. Canti.

17 All right. Now we are at finally, finally November
18 18th, 2022. Plaintiffs respond to the renewed motion to
19 dismiss and file what they call a renewed motion to withdraw
20 the reference pursuant to 28 U.S.C. 157(d). That renewed
21 motion, again, is the exact same as their supposedly cross-
22 motion that was filed in the district court. It's the exact
23 same as the motion they threatened to file a year ago in
24 November of '21. And it's now being asked to be heard today
25 when Your Honor has already adjudicated these exact same facts.

1 And, again, look at that gap, Your Honor. November
2 -- I'm sorry, September to November, Highland takes the time
3 and effort to file a renewed motion to dismiss. At no point in
4 that three-month gap until November of 2022, a year after Your
5 Honor already heard this issue, did they file their first
6 motion to withdraw the reference. And, again, if they already
7 had one on file, why did they file one again? It doesn't make
8 sense, Your Honor.

9 And that's timeliness. And, Ms. Canti, if you can go
10 to the next slide, please.

11 And all this is, Your Honor, is a summary of what I
12 just went through, right. Like look at this, April 2021,
13 November 2022. November 2022 after we've done all of this is
14 the first time they asked this Court to withdraw the reference.
15 Where is the timeliness? This is per-se untimely.

16 They could have filed a motion to withdraw the
17 reference in September of 2021. They didn't. They could have
18 filed their threatened motion to withdraw the reference in
19 November of 2021. They didn't. They could have at any time
20 between November '21 and March '22 before Your Honor entered
21 her final order filed a motion to withdraw the reference. They
22 didn't. Instead, they briefed their appeal, made no mention of
23 it.

24 September 2nd, 2022 it's remanded back here for an
25 adjudication on the merits of the motion to dismiss. They

1 could have filed a motion to withdraw the reference. Didn't.
2 Highland filed this motion to dismiss, no motion to withdraw
3 the reference. Only a year after Your Honor has heard the
4 merits of his exact motion to dismiss did they ask Your Honor
5 to withdraw the reference.

6 That's untimely, Your Honor. That is absolutely at
7 least in my estimation untimely, and I don't know how you get
8 around it. But it's worse than that, Your Honor. It's forum
9 shopping. Again, April 2021, they start this thing in the
10 district court an administrative expense claim. They seek to
11 prosecute outside of Your Honor. That's the first indication.

12 But going back to March of 2022 when Your Honor
13 reviewed the argument that Mr. Morris is about to make and said
14 that it was inclined to agree with Mr. Morris -- I'm sorry,
15 inclined to agree with Highland. Only after Your Honor gave
16 plaintiffs a preview of how you would rule on the motion to
17 dismiss that you're to hear today did Highland -- I'm sorry,
18 did plaintiffs file their motion to withdraw the reference.
19 That's forum shopping.

20 And the prejudice to Highland should also be apparent
21 from the timeline. Each of these little bullet represents a
22 significant cost to the estate. And what do plaintiffs want?
23 They want to go from November 2022 back to April of 2021. They
24 don't want any of this, Your Honor. They want to restart the
25 clock with significant cost to Highland and its creditors.

1 Impermissible.

2 28 U.S.C. 157(d) requires timeliness. If timeliness
3 is not met, the motion must be denied. There is no timeliness,
4 there is forum shopping, and there is prejudice. If that
5 weren't enough, Your Honor, they still lose on the merits on
6 the question of the (indiscernible) consideration of federal
7 non-bankruptcy law. And I think the clearest indication of
8 that is Mr. Sbaiti's argument. Supreme Court case, Supreme
9 Court case, Supreme Court case. Here are the SEC guidance.

10 Where did he say that there's a circuit split? Where
11 did he say that there's any unsettled law? Nowhere, Your
12 Honor, and he did that because there is no unsettled law.
13 These are very simple questions. Was there a fiduciary duty?
14 Was there a breach of that duty? And what is the remedy?
15 That's the exact same question that Your Honor and bankruptcy
16 courts all over this country answer and adjudicate every day.

17 There is nothing complicated about this case,
18 notwithstanding what plaintiffs want you to believe because
19 let's look at the issues, right. Let's drill them down. The
20 first issue is, is there a fiduciary duty under the Investment
21 Advisers Act. Yes. How do we know that? The Supreme Court
22 told us so. Non-issue.

23 The second issue is who does that fiduciary duty run
24 to? Under Goldstein, which we cited in our papers, under the
25 SEC guidance which we cited in our papers, it's very clear that

1 that fiduciary duty which is separate and apart from Rule
2 206(4) that Mr. Sbaiti cited, that fiduciary duty runs only to
3 the fund, not to the investors in that fund. And that makes
4 perfect sense, Your Honor. If an investment manager has a
5 fiduciary duty to the hundreds of -- potentially hundreds of
6 people who are invested in a fund individually, that's chaos.
7 And the investment manager will be sued every day. Settled
8 law, Your Honor.

9 And so what do you have to do? You have to look at
10 two agreements, the HCLOF investment management agreement,
11 Highland is indirectly the investment manager to HCLOF,
12 fiduciary duty. CLO Holdco is an investor in HCLOF. No
13 fiduciary duty between Highland to CLO Holdco because of HCLOF.
14 Again, Goldstein clear precedent.

15 Highland had an investment management agreement with
16 the DAF. Is there a fiduciary obligation to the DAF under that
17 agreement? Yeah. That's it, Your Honor. Okay, question one's
18 done.

19 Question two, assuming there's a fiduciary
20 obligation, what's the scope of that obligation and what's the
21 remedy for breach? Going to breach first, again, you heard Mr.
22 Sbaiti argue 206, 206, 206. Supreme Court precedent is
23 absolutely clear that 206 provides no private right of action.
24 Cases have been dismissed because they've been brought by a
25 private investor under Rule 206. That's the Corman case.

1 That's the Fifth Circuit we cite in our papers.

2 The Fifth Circuit doesn't stand alone on this, Your
3 Honor. Supreme Court precedent. 206 which again is the only
4 actual rule that they pled in their complaint does not provide
5 a private right of action. That's it, Your Honor. That's all
6 you have to do. Not complicated.

7 And I'll get to 215 in a second because even though
8 it wasn't pled in the complaint, I still want to talk about it.
9 Okay. So what is the scope of that allegation? Mr. Sbaiti
10 talked about a duty of care. Okay, that's fine. That's
11 clearly set out in the guidance, and a duty of loyalty. The
12 duty of loyalty under clear, again, Supreme Court precedent,
13 SEC guidance and, as Mr. Morris will talk about, a Northern
14 District of Texas case entered in an appeal from Mr. Dondero,
15 one of this Court's orders said the same thing. That duty of
16 loyalty is satisfied by disclosure.

17 So all Your Honor has to do is look at the
18 disclosures made to the DAF and say are those sufficient to
19 satisfy a reasonable investor about the conflict of interest or
20 the potential conflict of interest. That's it. Easy-peasy.

21 And so where do we go next? And, you know, I'm
22 actually going to leave out 215. It wasn't pled. It can't be
23 a motion.

24 THE COURT: This is your two-minute warning.

25 MR. DEMO: The case law is clear.

1 THE COURT: You have two more minutes.

2 MR. DEMO: Okay. Thank you.

3 Thank you, Your Honor. And I guess the last point,
4 and it bears repeating, is that Your Honor has already
5 adjudicated this in this Court and Your Honor actually
6 adjudicated it in the Acis bankruptcy. And this is on our
7 witness and exhibit list.

8 In the Acis bankruptcy, Highland then under the
9 control of Jim Dondero filed an objection to the plan saying
10 that it could not be confirmed because it violated applicable
11 law. What was that applicable law? The Investment Advisers
12 Act of 1940 for the exact same things that they're doing here.

13 (Indiscernible) examples of significant federal law,
14 plan injunction prohibits it. That's already been addressed
15 three times. Jury trial right, it's not up, but they don't
16 have a jury trial right because this is an administrative
17 expense claim, Your Honor.

18 The motion is untimely, it's prejudicial, it's forum
19 shopping, and there is nothing that's not -- nothing that rises
20 to the level of a material consideration of unsettled federal
21 law. All you have to do is look at the federal law and apply
22 it to a set of facts, the same thing you do every day in this
23 courtroom. For that reason, Your Honor, we'd ask the motion to
24 be denied and I can answer any questions.

25 THE COURT: All right. Mr. Phillips, you get one

1 minute in rebuttal.

2 MR. PHILLIPS: Your Honor, a couple of thing very
3 quickly.

4 Number one, whether or not what the district court
5 did, we asked and frankly maybe don't know the answer to
6 whether or not this Court can decide what the district court
7 did in its order of reference. But I guess, number one, I
8 guess we'll find out what the district court did.

9 We understand the case law, but we also understand
10 there's another version of the approach to matters filed in the
11 district court and that is we want the reference withdrawal
12 order to be complied with before we deal with anything.

13 That is a long-term judicial economy because if you
14 have people filing in the district court making their own
15 determinations, what's the best way to stop that from
16 happening? The order of reference will be enforced and if you
17 have a motion to withdraw reference, file it then.

18 Secondly, one of the things about the scope of
19 fiduciary duty that's before the Court in the lawsuit is that
20 they say there's an investment adviser agreement with DAF Fund,
21 the DAF Fund but not CLO Holdco.

22 But the investment advisory services subject to --
23 (indiscernible) the investment adviser shall act as an
24 investment advisor to the fund -- that's the DAF -- the general
25 partner with respect to the fund and its subsidiaries and shall

1 provide investment advice with respect to the investment and
2 reinvestment of the cash, financial instruments, and other
3 properties comprising the assets and liabilities of the fund
4 and the subsidiaries.

5 The subsidiary CLO Holdco is the one where the
6 investments are. That's where the investment advice actually
7 bore fruit. So the question -- there is a question about scope
8 of fiduciary duty and you couldn't have the investment adviser
9 agreement without the investment adviser being subject to the
10 Investment Advisers Act.

11 THE COURT: Okay.

12 MR. PHILLIPS: My point is from my standpoint --

13 THE COURT: Time's up.

14 MR. PHILLIPS: -- is that there was a question about
15 the scope of the duty. Thank you, Your Honor.

16 THE COURT: Thank you.

17 All right. Here's what I am going to do.

18 I am going to recommend that the district court deny
19 this renewed motion to withdraw the reference. First, I had
20 put together my own timeline before I saw Mr. Demo's and I
21 think I have to find that this is not a timely motion to
22 withdraw the reference.

23 The action as we all know was filed April 12th, 2021.
24 We are now January 25th, 2023. So I don't think the timeliness
25 requirement has been met here.

1 Second, this does feel like a second bite at the
2 apple, to use that worn-out metaphor. I think substantially
3 the same arguments were made, albeit in a differently-worded
4 pleading maybe to Judge Boyle, again, back in 2021. I guess it
5 was June 29th, 2021 when the plaintiffs first argued that the
6 district court should keep this matter and, among other things,
7 argued 28 U.S.C. 157(d). This involved consideration of both
8 Title 11 and other laws of the United States.

9 So it's sort of a second reason on top of
10 untimeliness that I think this has already been asked for once
11 and denied.

12 But yet another reason I will recommend denial of
13 this motion is I don't think this action ultimately involves
14 material consideration or significant consideration of other
15 laws of the U.S. regulating organizations or activities
16 affecting interstate commerce.

17 Again, the Investment Advisers Act is implicated.
18 RICO is implicated. But I don't think it's terribly
19 complicated. As I alluded to, bankruptcy courts consider
20 proofs of claim as well as requests for administrative expense
21 claims all the time that involve significant other law
22 including federal law, and I just don't think this triggers
23 mandatory withdrawal under 28 U.S.C. 157(d).

24 So I am going to go ahead and do that written report
25 and recommendation to the district court. Now normally, I

1 guess my most often followed practice is I don't rule on
2 motions to dismiss or any kind of dispositive motions while I'm
3 waiting on the district court to either adopt or reject a
4 report and recommendation.

5 But I'm going to go ahead and hear the arguments on
6 the motion to dismiss today even with that risk that the
7 district court may say, no, you're wrong, I'm yanking the case.
8 I'm going to go ahead and hear the arguments because my best
9 guess is the district court is going to adopt my report, okay.

10 My best guess is the district court is going to say
11 untimely, is going to say second bite at the apple, and I think
12 this is not materially enough other federal law to yank it from
13 the bankruptcy court. I may be wrong, and this may all be a
14 waste of time today. But I'm going to go ahead and hear the
15 hearing, the arguments on the motion to dismiss.

16 I'll say a couple of additional things. It's still
17 nagging at me the transcript that Mr. Phillips read from where
18 I said in this adversary I'm going to do a report and
19 recommendation to the district court on the previously-argued
20 motion to dismiss. I'm not questioning that because I have
21 this memory of me later going why did I say that.

22 This was referred to me. I had in my mind core
23 matter because it was a request for an allowance of
24 administrative expense claim against a debtor for conduct while
25 it was still a debtor in possession. So I thought at some

1 point I had come out and announced maybe in a different
2 Highland hearing and maybe others, not everyone was on the
3 call.

4 I thought I remembered correcting myself out loud to
5 the parties. Maybe I didn't. Maybe that was just back in
6 chambers to my law clerk, and I had every intention of coming
7 out and telling y'all and I didn't. So that's just an
8 explanation of that. I misspoke when I did that.

9 And then what was the other thing I wanted to say.
10 Well, gosh, I've lost my train of thought on that. Oh, I know
11 what it was. My law clerk noticed this week that when the
12 renewed motion to withdraw the reference was transmitted to the
13 district clerk's office from the bankruptcy clerk's office,
14 guess what? A new district court civil action number was
15 created, and it was assigned to a different district judge,
16 Judge Karen Scholer.

17 I don't think anyone would think that is the most
18 efficient thing to happen here, so we'll do our part on our end
19 to get personnel talking to personnel and hopefully get that
20 fixed to where it goes back to Judge Boyle. But no promises
21 there. We will just point it out and point out that we think
22 that was inefficient and a mistake and they'll do whatever
23 they're going to do.

24 All right. So with that, do you all need a five-
25 minute break before we launch into the motion to dismiss

1 arguments?

2 MR. MORRIS: I would --

3 MR. PHILLIPS: Your Honor, this is Louis Phillips. I
4 just wanted to tell Your Honor that we wanted to make sure that
5 we hadn't overlooked anything in the transcript that we cited.
6 And we read it again. I didn't. Ms. Heard read it again while
7 we were arguing. And we did not find anything else.

8 I have to -- I will tell the Court on the record that
9 we read a lot of pleadings, but we did not -- we did not come
10 across anything that we left out that would contradict that.
11 And we made sure again today there's nothing else in that
12 transcript that would contravene what I read to Your Honor. So
13 --

14 THE COURT: Okay.

15 MR. PHILLIPS: -- look, we understand that what
16 happened after was -- there was a final order. And so we
17 understand there was an appeal of the final order. And we have
18 to admit that we didn't read the entire record, and we have not
19 come across and ignored and not brought before Your Honor
20 something that would contravene what we've mentioned today in
21 argument.

22 THE COURT: Okay. Thank you for that. And, again,
23 it may have been back in chambers that I said what did I say
24 that for. I have the authority to issue a final order, and
25 certainly someone could have raised that on appeal if they

1 thought she made a mistake.

2 All right. So --

3 MR. PHILLIPS: Understood. Understood.

4 THE COURT: -- why don't we take a five-minute --
5 please, five minutes, not six -- five-minute break, and we'll
6 hear the oral arguments on motion to dismiss.

7 THE CLERK: All rise.

8 MR. PHILLIPS: Thank you, Your Honor.

9 (Recess at 2:58 p.m./Reconvened at 3:05 p.m.)

10 THE CLERK: All rise.

11 THE COURT: Please be seated.

12 All right. We are going back on the record in the
13 Adversary, CLO Holdco DAF versus Highland, the renewed motion
14 to dismiss.

15 Mr. Morris, I think we agreed 45 minutes and 45
16 minutes, right?

17 MR. MORRIS: That's correct.

18 THE COURT: Okay. You may proceed.

19 MR. MORRIS: Okay. Before I begin, Your Honor, may I
20 please just move for the admission into evidence of the
21 Defendant's Exhibits that are lodged at Docket 145? It's
22 Exhibits 1 through 14, and I understand there's no objection.

23 THE COURT: Confirm there's no objection.

24 MR. SBAITI: Your Honor, we agreed that we would
25 reserve our rights to object to the relevance of those to

1 certain arguments, but overall, we have no objection. And I
2 guess while we're on it, we also were asking to admit our
3 exhibits, which are on Docket 150.

4 THE COURT: Okay. And there's no objection to those,
5 Mr. Morris?

6 MR. MORRIS: Yeah. It's a little vague to say that I
7 have no objection to the exhibits, except potentially as to
8 relevance. I didn't quite understand that part.

9 THE COURT: Well --

10 MR. MORRIS: Is there objection or isn't there?

11 MR. SBAITI: Well, I just, they might not be relevant
12 to some arguments, is all I'm saying, but they can still be --

13 THE COURT: Well --

14 MR. MORRIS: So --

15 THE COURT: I'm going to say something. I've been
16 saying this a lot lately. You probably haven't heard it. But
17 I'm old enough to remember when a 12(b)(6) motion was, I look
18 at the motion response reply and look at the four corners of
19 the complaint, and there's either a plausible claim articulated
20 or not.

21 And what I have been seeing is these motions to
22 dismiss with appendices that are hundreds of pages long and
23 then responses with appendices that are hundreds of pages long.
24 So much so that one day, different case, I had a law clerk go
25 do research for me. Am I an old fogey who has it wrong, who

1 thinks I'm only supposed to look at the four corners of the
2 complaint?

3 And to my surprise, there is a Fifth Circuit case,
4 maybe everyone knew about it but me, that says if it's either
5 something attached to the complaint or something that goes at
6 the heart of the claims in the complaint, or words to that
7 effect, yeah, you can go beyond the four corners of the
8 complaint and have some evidence.

9 But I will tell you, I and every judge I know just we
10 keep getting these longer and longer and longer appendices and
11 then people just agree, as opposed to saying no, it doesn't go
12 to something at the heart of the complaint. And then, we find
13 ourselves with 4,000 pages of stuff to read before we can even
14 rule on a 12(b)(6) motion.

15 So that was my rant. If each side thinks the
16 appendices are within the spirit of that Fifth Circuit case
17 that says these items go to the heart of the complaint, the
18 claims articulated in the complaint, then I'll consider it all.
19 So are you both --

20 MR. SBAITI: Your Honor, if I may --

21 THE COURT: -- conceding to that?

22 MR. SBAITI: If I may, Your Honor --

23 MR. MORRIS: No, Your Honor. The point I was
24 making --

25 THE COURT: Okay. One at a time. One at a time. So

1 I'll let Mr. Sbaiti --

2 MR. MORRIS: -- with respect to the defendants'
3 exhibits --

4 THE COURT: -- since he --

5 MR. MORRIS: -- Your Honor --

6 THE COURT: Okay. Mr. Sbaiti, do you agree or not
7 agree that the Court can consider these exhibits of defendant?

8 MR. SBAITI: Yeah, Your Honor. Your point went to
9 the heart of my reservation of rights to argue relevance. I
10 think a lot of the exhibits they've attached and what we've
11 attached are relevant to the judicial estoppel argument because
12 I think that's something we do have to look outside the
13 complaint to look to whether judicial estoppel was there.

14 I don't think those exhibits are relevant to the
15 other issues. That's the heart of my reservation.

16 MR. MORRIS: And I would agree with that, Your Honor.
17 I was going to actually make the exact same point. So --

18 THE COURT: Okay.

19 MR. MORRIS: -- there you've got (indiscernible)
20 agreement on the admission of the exhibits, but on the scope.

21 MR. SBAITI: Yeah.

22 THE COURT: Okay. Got it. So you both agree to all
23 of your exhibits with the understanding that these go to the
24 judicial estoppel arguments. Yes?

25 MR. SBAITI: Not all of them. Exhibits 13 and 14 are

1 two agreements that are at the heart of the case that --

2 MR. MORRIS: I agree with that.

3 MR. SBAITI: -- at the heart of the matter.

4 THE COURT: All right. So with that out of the way,
5 we'll start the timer. I've admitted these exhibits.

6 You may proceed.

7 (Defendants' Exhibits 1 to 14 admitted into evidence)

8 MR. MORRIS: Okay. Thank you, Your Honor.

9 John Morris, Pachulski Stang Ziehl and Jones, for the
10 defendants.

11 Your Honor, I want to begin with just a brief
12 background. Although I know how familiar the Court is with
13 these facts, this entire adversary proceeding arises from the
14 debtor's settlement with HarbourVest. HarbourVest had a \$300
15 million claim based, unfortunately, on misrepresentations and
16 other causes of action.

17 And as the Court is aware, a settlement was a reach
18 that was effectively a rescission of HarbourVest's investment
19 whereby the debtor divided HarbourVest with allowed claims of
20 \$80 million, which was their investment amount, a portion of
21 which was in Class 8 and a portion of which was a subordinated,
22 unsecured claim in Class 9. And HarbourVest surrendered their
23 interest in HCLOF to a wholly owned affiliate of Highland.

24 There's no dispute that CLO Holdco objected,
25 contending that the transfer of HarbourVest's interest was not

1 permitted under the members agreement because it violated
2 supposedly its right of first refusal and there's no dispute
3 that after the issue of the ROFR was fully briefed that CLO
4 Holdco did further diligence and thereafter acknowledged that
5 the ROFR did not apply to the circumstances at issue, and they
6 withdrew their objection.

7 Following the withdrawal of CLO Holdco's objection,
8 the Court heard argument, overruled the remaining objections,
9 and approved the 9019 settlement and the settlement was
10 effectuated. The settlement order expressly provided that the
11 transfer of the HarbourVest interest to the debtor's affiliate
12 could be effectuated "without the need to obtain the consent of
13 any party or to offer such interest first to any other investor
14 in HCLOF." And while that order is the subject of an appeal
15 pending in the Fifth Circuit right now, it wasn't appealed for
16 purposes of challenging that provision.

17 A couple of months later, the plaintiffs brought this
18 action with new counsel and a new trustee. Your Honor may
19 recall that shortly after the HarbourVest settlement, Grant
20 Scott left the trustee, and John Kane, his lawyer, was
21 terminated as well to be replaced by Mr. Patrick and
22 Mr. Sbaiti.

23 And they commenced this action originally in the
24 district court. And in substance, there's really two issues
25 that underlie the entirety of the complaint. Number one, the

1 plaintiffs allege that the debtor had a legal obligation to
2 offer the HarbourVest interest to the plaintiffs before
3 effectuating the transfer. We'll show in a few minutes that
4 the plain and unambiguous terms of the two agreements I just
5 pointed out, Exhibits 13 and 14, the very agreements that
6 plaintiffs rely upon, prove that no such duty existed and no
7 such duty exists under federal law or fiduciary duty for this
8 particular transaction because of the nature of the parties'
9 agreements.

10 The second issue that underlies the complaint is the
11 allegation that Mr. Seery received inside information in
12 December, 2020, and therefore, knew or should have known, the
13 \$22.5 million value be placed on HarbourVest's interest was, I
14 think the words used in the complaint are, "off the mark."

15 Rest assured, Your Honor, if Highland is ever
16 required to do so, Highland will prove that these insider
17 trading allegations are absurd. But we understand the law. We
18 understand that for purpose of a motion to dismiss, the Court
19 must accept the allegations as true.

20 But at the end of the day, Your Honor, since Highland
21 had no legal or contractual obligation to make this transaction
22 available to the plaintiffs, the valuation is completely
23 irrelevant. It really doesn't matter because there's nothing
24 for the plaintiffs to rely upon at the end of the day if they
25 had no ability to participate in the transaction.

1 Based on these two issues, Your Honor, plaintiffs
2 have conjured up five separate causes of action, breach of
3 fiduciary duty, breach of the members agreement for the ROFR,
4 negligence in regards to Mr. Seery's testimony about the sales
5 price, and the failure to give plaintiffs the opportunity to
6 buy the asset. There is a RICO claim, of course, and there's
7 tortious interfere.

8 Procedural history, very briefly, Your Honor.
9 Highland, as Mr. Demo described, moved to dismiss on
10 substantive grounds, as well as on grounds of collateral and
11 judicial estoppel. Ultimately, this Court granted the motion
12 on collateral and judicial estoppel and stated that while it
13 was inclined to agree with the defendants on the substantive
14 points, it simply refrained from addressing the motion to
15 dismiss on 12(b)(6) grounds really for purposes of judicial
16 economy.

17 The plaintiffs appealed that final order. After
18 determining that collateral estoppel did not apply, the
19 district court affirmed this Court's findings on the first two
20 elements of judicial estoppel, but remanded on the sole issue
21 of whether the plaintiffs' inconsistent positions was
22 "inadvertent" and really the only issue that the Court sent
23 down here, and here we are.

24 Let me begin with Counts 2 and 5 and the matter that
25 the district court referred back to the bankruptcy court,

1 judicial estoppel. The only issue is whether the inconsistent
2 positions are inadvertent. CLO Holdco, as I mentioned and as
3 the Court knows, withdrew its objection to the 9019 motion
4 based on the ROFR with the advice of very sophisticated
5 counsel, John Kane.

6 Mr. Kane's statements to the Court provide all the
7 evidence that's needed to show that CLO Holdco's decision to
8 withdraw the objection based on the ROFR was deliberate,
9 intentional, and made on a fully informed basis.

10 Ms. Canty, if you can put up Slide 1.

11 I'm putting up on the screen, Your Honor, just an
12 excerpt of Mr. Kane's presentation to the Court where he said,
13 among other things, that CLO Holdco has had the opportunity to
14 review the reply briefing. After doing so, has gone back and
15 scrubbed the HCLOF corporate documents. They analyzed
16 Guerensey law and some of the arguments of counsel in those
17 pleadings and they reviewed appropriate documents.

18 And after doing all of that work, Mr. Kane informed
19 the Court that he had obtained the authority from his client,
20 Grant Scott as the trustee for CLO HoldCo, to withdraw the CLO
21 Holdco objection based on "the interpretation of the member
22 agreement."

23 You can take that down now.

24 Plaintiffs can't refute this, right? There's nothing
25 to refute. Those words are clear as day. The decision to

1 withdraw was informed. It was deliberate. It was purposeful.
2 And it was consequential.

3 Instead, new counsel makes arguments concerning
4 basically the state of mind of Mr. Scott and Mr. Kane that not
5 only have no factual basis but really are not plausible at all,
6 right? If they wanted this Court to know what Mr. Scott or
7 Mr. Kane thought, perhaps they should have had them submit some
8 evidence into this. They didn't do that. They didn't do that,
9 and instead, they speculate as to what they would have done if
10 they were in their shoes. That's not proper here.

11 They argue first that the claim now is that Highland
12 breached the members agreement, a claim that Mr. Kane and
13 Mr. Scott were apparently unaware of since they only waived the
14 objection with respect to HarbourVest's obligations under the
15 agreement. So this is their first argument that it was
16 inadvertent because they didn't know.

17 There's no evidence that they didn't know, but that's
18 their argument. Simply an argument that they made by new
19 counsel on behalf of a new trustee with citation to nothing.
20 More importantly, Your Honor, the district court has already
21 held that CLO Holdco "made clear in the withdrawal of its
22 objection that it no longer disputes the other party's
23 interpretation of the right of first refusal, which now forms
24 the basis of Charitable DAF's second and fifth causes of
25 action. That's at Page 16 of the Court's order.

1 The district court's holding that CLO Holdco's
2 position applied to all parties was correct. It's the law of
3 the case and cannot be overcome by new counsel's speculative
4 musings.

5 Second, plaintiffs speculate that quote, and this is
6 I think on Page 9 of their opposition, "But for the
7 misrepresentation, Holdco would not have withdrawn its
8 objection. It would've made a more robust objection to the
9 settlement or sought a different path." This argument fails
10 for at least the following reasons.

11 Again, there's absolutely no evidence to support it.
12 It's simply an argument made by new counsel on behalf of a new
13 trustee with citation to nothing. But more troubling to me,
14 Your Honor, is it suggests that Mr. Kane would have engaged in
15 unethical conduct. We know what he told the Court. We know
16 that he concluded that his clients couldn't rely on the ROFR to
17 prevent the transfer. That's what he told you.

18 Even the plaintiffs don't contend that valuation is
19 relevant to determining whether ROFR applies. It doesn't. The
20 ROFR applies or it doesn't, and it has nothing to do with
21 value. And yet, we're told today that counsel wants this Court
22 to find that even though the legal analysis would not change at
23 all, Mr. Kane would have pressed the objection or done
24 something different, even though he concluded it was without
25 merit based on a representation that has absolutely nothing to

1 do with the ROFR. I don't think that's proper.

2 I don't think the Court should find that Mr. Kane,
3 having concluded that the ROFR applied, would have told the
4 Court that it did simply because you have to accept the
5 misrepresentation claim as true. It's not a particularly
6 credible argument. (Indiscernible), Your Honor, that the
7 purpose of judicial estoppel is to protect the integrity of the
8 judicial process by "preventing parties from playing fast and
9 loose with the courts to suit the exigencies of self-interest."

10 The evidence conclusively establishes that based on
11 Mr. Kane's thoughtful advice and analysis, after due
12 deliberation, that CLO Holdco knowingly and intentionally
13 acknowledge that the ROFR and the members agreement did not
14 preclude the HarbourVest transaction to an affiliate of the
15 debtor.

16 The Court should protect the integrity of the
17 judicial process, reject plaintiffs' attempts to play fast and
18 loose, and dismiss Counts 2 and 5 on the ground of judicial
19 estoppel.

20 Having said all that, it's kind of easier on a
21 certain level, although I think that's pretty black and white.
22 If you just look at Mr. Kane's own words, it's really easy to
23 dismiss both counts on the merits. Even if Count 2 wasn't
24 barred by judicial estoppel, it must be dismissed for failure
25 to state a claim upon which relief can be granted.

1 And if we can put up Slide 2, please.

2 Let's take a look at the members agreement, Your
3 Honor. This is the members agreement. It's Defendant's
4 Exhibit 13. We're looking at Sections 6.1, 6.2.

5 Section 6.1 of the members agreement expressly
6 provides that members shall not transfer their shares other
7 than to an affiliate of an initial member party hereto without
8 getting consent.

9 So if a member wants to transfer their shares to an
10 affiliate of an initial member to this agreement, they don't
11 have to get consent. They can do it whenever they want. And
12 there is no dispute that HarbourVest was a member. And there's
13 no dispute that the transfer was to an affiliate of Highland
14 who was an initial member and party to this agreement. So I
15 don't think there's any argument at all that HarbourVest had
16 the ability to transfer its interest in HCLOF to an affiliate
17 of Highland.

18 6.2 is the ROFR, okay. So what we've done is we've
19 highlighted the portion that I think applies here. Prior to
20 the transfer, prior to making any transfer, and that's where
21 the parenthetical really ends the whole discussion. Other than
22 transfers to affiliates of an initial member, a member must
23 first offer to the other members the right to purchase the
24 shares.

25 So the obligation, the ROFR, by the plain unambiguous

1 terms of the agreement simply does not apply to transfers to
2 affiliates of an initial member. Again, this was a transfer in
3 the settlement to an affiliate of an initial member. In this
4 instance, Highland. This is the parties' agreement.

5 Highland and HarbourVest had every right under this
6 agreement to do this transaction. They had no obligation to
7 offer it to the plaintiffs or to anybody else. That's what the
8 plain terms say. So while we think they should be estopped,
9 judicially estopped, from making the arguments and pursuing
10 these claims, they fail on the merits anyway. And these
11 Counts 2 and 5 should be dismissed with prejudice because
12 there's nothing they can do to rewrite this agreement. There's
13 no way around it. The agreement says what it says. The
14 parties are bound by it.

15 Let's turn to Count 5. We can take that down.

16 Count 5 fails to allege a plausible plan for tortious
17 interference, and that's kind of simple because the tortious
18 interference here is that Highland allegedly interfered with
19 CLO Holdco's rights under Section 6.2 of the management
20 agreement. As we just saw, it did not. It could not. It had
21 no obligation. It simply had no obligation.

22 Let me state it differently. CLO Holdco had no right
23 to participate in this transaction. They had no right of first
24 refusal and there was no right in the contract otherwise
25 because they cite exclusively to 6.2. There's no right

1 otherwise that the plaintiffs rely upon as a right that
2 Highland tortiously interfered with.

3 So since 6.2 did not provide CLO Holdco with a ROFR
4 under these particular circumstances, Highland could not have
5 tortiously interfered with it. Stated differently. There
6 can't be a cause of action for tortious interference with a
7 contractual right that never existed. No amendment changed
8 that. Count 5 should be dismissed with prejudice.

9 Count 4 fails to state a cause of action for RICO.
10 Plaintiffs allege that defendants are liable under RICO. The
11 defendants move to dismiss this count because there is no
12 plausible cause of action for at least the following reasons.

13 RICO claims can't be predicated on Securities Law
14 violations. Allegations concerning mail and wire fraud were
15 not stated with particularity and otherwise fail to meet the
16 heightened pleading requirements under Rule 9(b).

17 Plaintiffs fail to plead a pattern of racketeering
18 activity, nor could they since, based on the pleading, the
19 entire complaint is based on a singular statement during the
20 9019 hearing concerning a singular transaction with no
21 suggestion that there would or could be a continuing or future
22 threat. So you don't have a pattern of racketeering activity.

23 They fail to state a cause of action because they
24 fail to plead that the RICO association in fact enterprise.
25 They fail to plead causation. And here's the thing, Your

1 Honor, this is really simple, they didn't contest any of this.
2 Plaintiffs did not file a substantive response to the motion to
3 dismiss on RICO.

4 Instead, at the end of their pleading, at Page 23,
5 they purport to move to dismiss the RICO claim "at this time,
6 pursuant to Rule 41, while purportedly reserving the right to
7 bring the claim at some future time." Your Honor has heard
8 this playbook before. We heard it in HCRE. We heard it with
9 claims that have been withdrawn. You know, don't rule on this
10 because we want to save it for another day. They can't do
11 that. The Fifth Circuit has said you can't do that. That's
12 not what Rule 41 is about.

13 Their so-called motion on Page 23 is improper for at
14 least the following reasons.

15 It doesn't comply with Bankruptcy Rule 8013(a)(2)(A)
16 because it fails to state with particularity the grounds for
17 the motion and the legal argument necessary to support it.

18 Rule 41(a) is made applicable to this adversary
19 pursuant to Bankruptcy Rule 7041. The title of that rule, Your
20 Honor, is "Dismissal of Adversary Proceedings." Neither the
21 title of the Rule nor the substance of the Rule concerns,
22 addresses, or permits the dismissal of individual claims.

23 The same is true for Rule 41 itself. It is titled,
24 "Dismissal of Actions." Section (a), which the plaintiffs rely
25 upon, states "Plaintiff may dismiss an action without a court

1 order under certain circumstances." That's not what they're
2 trying to do here. They're trying to dismiss a singular claim.

3 Even if they had complied with 8013, and they didn't,
4 they have no right to do that under Rule 41. You don't have to
5 take my word for it, Your Honor, we cite it in our brief. The
6 Fifth Circuit's decision in National Horsemen's. It's in
7 Paragraph 1 of our reply.

8 The Fifth Circuit said very clearly that Rule 41(a)
9 does not allow for the dismissal of individual claims, right.
10 If they wanted to dismiss an individual claim, they had to
11 amend their pleading and proceeded under Rule 15, and we would
12 have had the opportunity to say they can't do this unless it's
13 without prejudice -- you know, unless it's with prejudice,
14 right.

15 We would have argued hard that all of these issues
16 should be pled together, that there is no basis to with
17 withdraw it to save it for another day. It would be, you know,
18 it would wreck havoc on the judiciary. You'd be trying the
19 same case in multiple forums at multiple times. They didn't do
20 that. They went under Rule 41(a). The Fifth Circuit has said
21 you can't do that.

22 So the dismissal of this claim, the RICO claim,
23 should be with prejudice. There is no plausible claim that can
24 be alleged under the circumstances. There is no defense to the
25 motion to dismiss. There is no substantive defense. They'll

1 never be able to plead a pattern of racketeering. We know what
2 the factual predicates are here.

3 It's the HarbourVest settlement, a singular
4 transaction that occurred over a matter of weeks with no
5 continuing or future, you know, harm that could ever be done.
6 That's the claim that they have. So this cause of action, too,
7 should be dismissed with prejudice.

8 Negligence, Count 3, should also be dismissed with
9 prejudice. Count 3 alleges that Mr. Seery negligently valued
10 HarbourVest's interest in HCLOF. They fail to give plaintiff
11 the opportunity to purchase the interest. This count should be
12 dismissed with prejudice for the following reasons.

13 Number one, of course, Highland's plan of
14 reorganization exculpates the debtor for claims of negligence
15 arising from the administration of the estate. That part of
16 the confirmation order has been specifically affirmed by the
17 Fifth Circuit Court of Appeals. I can't think of a better
18 example of a debtor administrating the estate and resolving
19 claims.

20 If there's one thing that I know a debtor does, and I
21 know a debtor does many things, but there's no dispute that one
22 of the -- there's one thing debtors must do to administer the
23 estate is to resolve claims. So the exculpation provision bars
24 Count 3.

25 They suggest somehow that the defense should be

1 stricken because it was raised previously and therefore waived.
2 I'm not sure what that means, but there's no evidence. There
3 will never be any evidence that Highland ever knowingly,
4 intentionally, you know, relinquished their protection from
5 negligence claims arising from the administration of the
6 estate. The plan's exculpation clause really should end this
7 inquiry.

8 But there is more if Your Honor needs it.

9 The plaintiffs also refer to the Advisers Act to
10 contend that it imposes a duty of care and loyalty. You heard
11 Mr. Sbaiti say that earlier under Section 206. This is their
12 argument.

13 You know, he did refer to some case out there that
14 said otherwise. And he's right and he should know that because
15 it's his case. He brought the case on behalf of NexPoint from
16 Mr. Dondero, the Southern District of New York, against Josh
17 Terry and Acis. It's the case that we've cited in our brief.

18 And last summer, the Southern District of New York,
19 who probably does have a lot of experience with Investment
20 Adviser Act claims, said "No private right of action under
21 206." Plain and simple. They cited to Transamerica. They
22 quoted Transamerica. They said the Supreme Court held there
23 that there is no private right of action under Section 206.
24 Transamerica made no distinction between investors or the fund.
25 It unequivocally held that there is no private right of action

1 under Rule 206.

2 But there's more because there's always more. In the
3 advisory agreement, there's a very explicit separate
4 exculpation clause that the DAF agreed to. And if we can put
5 up to the screen Slide 3. And I will admit, Your Honor, this
6 is not in our brief. But this is the document that the
7 Plaintiffs are relying upon. This is the advisory agreement
8 that they contend, you know, imposes duties on Highland.

9 I'll wait for Mr. Sbaiti to explain his views as to
10 this agreement, but the Court has to consider the four corners
11 of the agreement. It is the principal -- one of the principal
12 basis for the whole lawsuit. And in Section 11, the DAF agreed
13 that to the fullest extent permitted by law, no covered person
14 shall be liable, general partner, or the Fund, or any of its
15 subsidiaries including CLO Holdco.

16 I heard Mr. Phillips say that somehow CLO Holdco is a
17 beneficiary under this agreement. Well, if they are, they've
18 also exculpated Highland for any reason whatsoever, less the
19 act or omission constituted willful misconduct or gross
20 negligence. They can't bring their own agreement. And it's
21 funny, Your Honor, because think about the context in which
22 this agreement is drafted.

23 This agreement is drafted by Mr. Dondero's company,
24 Highland, who's going to provide advisory services to his own
25 Donor Adviser Fund, the DAF. This is his agreement. I want to

1 hear why it doesn't apply. I want to hear why this exculpation
2 provision doesn't preclude a negligence claim. It absolutely
3 does.

4 Finally, the negligence claim could never be
5 plausible in any event, because the Plaintiffs didn't have a
6 right of first refusal. We saw that they reached an agreement
7 with Highland that said they were not going to get a right of
8 first refusal if there's a transaction between affiliates of
9 initial members.

10 And so if you have agreed that that conduct is
11 permitted, you cannot plausibly assert a cause of action that
12 says you were negligent in executing that same contract. And
13 by the same token, the whole concept of oh, they misstated the
14 value. Also irrelevant, because the valuation has nothing to
15 do with any rights that the Plaintiff has. There's nothing for
16 them to rely on.

17 HarbourVest maybe. You know, HarbourVest would have
18 a complaint. I haven't heard from them on that point, although
19 I speak to from time to time. But Plaintiffs have no standing
20 here. They have no interest. There's no reliance. Whatever
21 Mr. Seery said about value, the Court can accept as true. All
22 the allegations in the complaint, it is a big so what.

23 Finally, the fiduciary duty issue. That also must be
24 dismissed. Count 1 is for breach of fiduciary duties. It's
25 premise are the exact same facts; insider trading,

1 misrepresentation, or the concealment of the true value of
2 HarbourVest's interests and the diversion of the investment
3 opportunity. This count must also be dismissed with prejudice.
4 To be clear, as a matter of law, the Defendants never owed a
5 fiduciary duty to CLOF -- CLO Holdco.

6 HCF as the adviser, is a wholly-owned affiliate of
7 the debtor and it serves as the portfolio manager of HCLOF, but
8 it is black-letter law -- and this is gold standard, you heard
9 Mr. Demo refer to it earlier -- that there is no fiduciary
10 relationship between a Fund adviser and the funds investors.

11 The relationship is between the Fund adviser and the
12 Fund. That's who the agreement is with. That's who they
13 serve. They all take direction from Fund investors. They have
14 no obligation to listen to Fund investors. And as Mr. Demo
15 cogently pointed out, think about the chaos that would result
16 if Fund advisers owed fiduciary duties to each of the Fund's
17 investors.

18 To the extent that the Plaintiffs allege that the
19 fiduciary duties are owed by Highland to the DAF under the
20 Investment Advisers Act, I'd again point out, Your Honor, there
21 is no private right of action under the Investment Advisers Act
22 to enforce violations of Rule 206, which is the only thing that
23 the Plaintiffs have pled. There is no viable remedy. You
24 can't bring a claim for damages as they're trying to do here.
25 That's the holding of the Supreme Court in TransAmerica. And

1 that's the holding in Mr. Sbaiti's NexPoint case from the
2 Southern District of New York.

3 But here's the thing. Even if a fiduciary duty
4 existed, they still can't plead a plausible cause of action.
5 Why? Because Highland owes no duty to CLO Holdco as an
6 investor in HCLOF. None. Even if it did, Highland complied
7 with the members agreement governing HCLOF. They were
8 permitted to do this transaction. How can you breach your
9 fiduciary duty by complying with the very agreement that the
10 Plaintiff is a party to? They can't.

11 Second, Highland had an investment advisory agreement
12 with the DAF as Mr. Demo conceded. It does give rise to
13 fiduciary duties. But what are the obligations? To make a
14 full and fair disclosure of potential conflicts of interest.
15 And what did Highland do under the direction of Mr. Dondero?
16 He did exactly that. Right? Mr. Dondero is always looking out
17 for Mr. Dondero. And he's got to live with the consequences of
18 that now, even though he's not in control of Highland.

19 And here's the thing. Mr. Dondero knows that because
20 Dugaboy made the exact same argument that Mr. Sbaiti is making
21 here. He did it in connection with the UBS settlement. Your
22 Honor, will recall that Dugaboy objected to that settlement.
23 They appealed that settlement to Judge Starr. It wound up in
24 front of Judge Starr in the District Court. And he heard the
25 exact same argument that these folks are making here.

1 Dugaboy argued that Highland, that's Multi Strat's
2 investment manager, had fiduciary duties that could not be
3 waived, right? We hear Mr. Sbaiti say that. Unwaivable
4 fiduciary duties could not be waived. But Judge Starr found
5 that the applicable provision, and I'm going to quote from it
6 here, this is the Dugaboy decision that we've cited in our
7 brief.

8 He said, "It's true that the Act prohibits any
9 provision binding any person to waive compliance with any
10 provision of the Act, but that provision stands for the
11 proposition that general waivers of the Investment Advisers Act
12 protections will not be enforceable." It says nothing about
13 whether a fiduciary duty beneficiary, such as the Plaintiffs
14 here, gave informed consent to a specific scheme.

15 So the notion that the fiduciary duties somehow can
16 never be waived, it's not true, right? Take Judge Starr's word
17 for it. He's in the District Court, right. The same court
18 that these guys think would be a more appropriate forum to hear
19 these very sophisticated issues. Judge Starr said no.
20 Dugaboy, you're absolutely wrong.

21 Judge Starr found specifically in the conflict of
22 interest section in the Multi Strat private placement memo,
23 evinced informed consent that Highland might resolve issues in
24 a manner inconsistent with the interests of Multi Strat's
25 investors. Highland was allowed -- Highland had complete

1 authority to settle or compromise suits on behalf of Multi
2 Strat without notice, without seeking anybody's prior approval.

3 He went through in detail and quoted some of the
4 conflict of interest language. The same result hold here.
5 Let's take a look at the advisory agreement and see the
6 conflict of issues that were disclosed to the Plaintiffs here.
7 If we can put Slide 4 on the screen.

8 So Slide 4, this is Exhibit A, again to the advisory
9 agreement. It's Exhibit 14, and they've got a whole section.
10 It goes on for a couple of pages, Your Honor, called potential
11 conflicts of interests. And it says that the Highland Group
12 can age in transactions whether or not such vendors are
13 competitive with the Fund. The Fund here is the DAF.

14 "The Fund will be subject to a number of actual and
15 potential conflicts of interest involving Highland, including
16 among other things, that Highland may actively engage in
17 transactions for the same securities saw by the Fund and may
18 compete with the Fund for investment opportunities, or may hold
19 positions opposite to positions maintained by the Fund." If we
20 can go to the next slide, because it continues.

21 "Highland Group Trading as part of its regular
22 business, the members of the Highland Group may hold, purchase,
23 sell, trade, or take other related actions for their own
24 account. The members of the Highland Group will not be
25 restricted in their performance of any services or in the types

1 of debt or equity investments, which they may make."

2 And this is the most important part here. In
3 connection with those activities, "The members of the Highland
4 Group may hold, purchase, sell, trade, or take related actions
5 in securities or investments of a type that may be suitable to
6 investments for the Fund.

7 "Members of the Highland Group will not be required
8 to offer such securities or investments to the Fund or provide
9 notice of such activities to the Fund." In other words,
10 Highland could enter into this -- this is the party's
11 agreement. This is exactly what Judge Starr said was
12 permitted. Informed consent.

13 This is Mr. Dondero talking to Mr. Dondero. It's his
14 company talking to his Donor Adviser Fund, and he's talking to
15 himself, and he's saying, okay, look, I may -- I'm going to be
16 able to do whatever I want. And don't worry. You know, it may
17 conflict with you. But if I want to look out for this guy,
18 I'll look out for this guy. I want to look out for that guy,
19 I'll look out for that guy. I'm not going to tell you. I'm
20 not going to give you the opportunity. This is the agreement
21 that he struck with himself. He may not like it today. But
22 that's the agreement that he struck with himself.

23 Through these provisions, Highland has made full
24 disclosure about potential conflicts of interest. DAF, a
25 fiduciary duty beneficiary, to use Judge Starr's term, gave its

1 informed consent to a specific scheme. It was not a general
2 waiver of the IAA's protections. That would be wrong. No
3 general waiver. That's what Judge Starr said he couldn't do.
4 And that's not what's happening here. Rather, a specific
5 scheme was agreed upon between Mr. Dondero's company and his
6 donor advised Fund.

7 Finally, let's just look at reality. There was no
8 corporate opportunity to divest. Highland didn't buy anything.
9 They settled a \$300 million claim. They structured it at the
10 request of HarbourVest in a manner of rescission. So they took
11 the investment back, gave the \$80 million back in the form of
12 claims. And that's it. That's not an opportunity that ever
13 existed for the Plaintiffs or for anybody else.

14 In short, no fiduciary duty to CLO Holdco. Highland
15 made full and complete disclosure of its conflicts of interest,
16 including expressly stating that Highland could acquire
17 securities without offering them to the DAF or even giving the
18 DAF notice. At the end of the day, Highland didn't take an
19 opportunity that was ever available to the DAF that they had no
20 right to. Rather it settled a \$300 million claim and
21 transferred its interest as part of the settlement.

22 No amendment can change these facts, Your Honor.
23 There was no private cause of action under the Investment
24 Advisers Act. Highland owed no duty to CLO Holdco. Highland
25 fully disclosed the very scheme that purported to settle the

1 HarbourVest claim as it did. And there was no opportunity that
2 the Plaintiffs could have taken advantage of. By my count,
3 Your Honor, I'm at 38 minutes, so I'd like to reserve seven for
4 rebuttal.

5 THE COURT: Okay. My law clerk confirms 38 minutes.

6 All right. Mr. Sbaiti?

7 MR. SBAITI: Thank you, Your Honor. Your Honor, the
8 -- I'm going for the most part rest on our briefs because I
9 think they deal with a lot of the issues that were discussed.
10 And I'd like to focus on the Advisers Act and the fiduciary
11 duty argument and I'll address Mr. Morris' arguments there.

12 The case does begin though with Mr. Seery's testimony
13 at the settlement appeal hearing on January 14th, 2021. Mr.
14 Morris has that correct. He testified specifically that the
15 HarbourVest interest in HCLOF was worth 22 and a half million.
16 He also testified that that was the value at the end of
17 November of 2020. He also testified that that was a fair value
18 for the HarbourVest interest that Highland actually had, and he
19 testified that the value hasn't gone up explosively. And he
20 said that we think that's good real value.

21 After Your Honor approved the settlement, the DAF
22 discovered two months later that in January 2021, Highland's
23 internal metrics did or should have valued HCLOF under an NAV,
24 a net asset value basis, because these are not totally liquid
25 securities. And when they went back and did the math

1 internally, the net asset value as we pled of those securities
2 at the end of November, would have been about 34 and a half
3 million, not 22 and a half million. And it would have been
4 closer to \$42 million by the time that he was testifying in
5 Your Honor's court. So we start with that misrepresentation
6 and the case it arises from the outcroppings of the
7 implications of that misrepresentation.

8 One of the things that we looked at is under the
9 Advisers Act is that under Transamerica Mortgage, as I said
10 earlier, it says that violations of Section 206 are actionable
11 under Section 215. You've heard Mr. Demo and now Mr. Morris
12 say that the Supreme Court has held that Section 206 does not
13 have a private right of action for damages. And he's
14 absolutely correct. But that doesn't mean that if there's a
15 violation of Section 206, that you have nothing.

16 What Transamerica Mortgage held, was that there was a
17 private right of action under Section 215 of the Advisers Act
18 for breaches of Section 206. You do have a private right of
19 action. And that's one of the ways we believe violations of
20 Section 206 are actionable.

21 The other way we argued that violations of Section
22 206, which does impose fiduciary duties on an investment
23 adviser, purely by virtue of its activities as an investment
24 adviser is that Judge Boyle and other courts, as we cite in our
25 brief, Judge Boyle had a case called Douglas v. Beekley

1 (phonetic). Held that state fiduciary duty actions can be
2 predicated upon breaches of the fiduciary duties owed under the
3 Investment Advisers Act.

4 Judge Boyle found that, and then we've also cited
5 cases in other jurisdictions that have similarly found. And I
6 would note that although in the reply, Mr. Morris, or excuse
7 me, Highland takes the position that, you know, we haven't pled
8 a state cause of action. We actually pled a breach of
9 fiduciary duty and then pled both damages, and
10 discouragement/rescission, the full panoply which are available
11 under both state and federal.

12 And in fact, as you've heard Highland's lawyers say
13 multiple times today that they originally filed their motion to
14 dismiss, and that this new motion to dismiss is substantially
15 similar. In our response to their original motion to dismiss,
16 we also cited the case law that says that violations of Section
17 206 of the Advisers Act are actionable through state law,
18 fiduciary duty actions, and that's what we've pled. We didn't
19 limit ourselves to only state or federally available remedies.
20 So I'll concede --

21 THE COURT: Can I stop you? Because I'm really hung
22 up on this issue. If it's actionable, what is the remedy? If
23 it's not damages, what is the remedy you think is available?

24 MR. SBAITI: So I do believe damages are available
25 under a fiduciary duty claim under Section -- under the Section

1 215. And this is where I was going earlier on. Section 215
2 essentially voids either a contract that waives or waives
3 compliance with the Advisers Act or voids the provisions, but
4 it also voids the rights of someone who performs a contract in
5 violation or makes a contract in violation of one of the duties
6 under the Advisers Act.

7 And what the Supreme Court said in Transamerica is,
8 once you have a void right or a void provision, then the
9 incidences of voidness, which they included to be restitution
10 or disgorgement, and other courts have construed to mean other
11 equitable remedies that would happen once you have voided a
12 right, it could include things like disgorgement, of course,
13 then you actually have those rights.

14 And in fact, Judge Boyle's case, Douglas v. Beekley
15 also addresses the fact that those can be the remedies once the
16 rights of a violator have been voided under Section 215 of the
17 Advisers Act.

18 THE COURT: So let's take that from conceptual to
19 these facts. How would that play out?

20 MR. SBAITI: Sure. So Your Honor, we would argue,
21 because we're seeking damages for the lost opportunity, or
22 disgorgement of the asset, and so one of two options could
23 happen. Either Highland could transfer the interest in
24 exchange for, you know, would have an offset, would have an
25 unjust enrichment right. DAF I think would owe \$22 and a half

1 million to Highland to compensate for what it paid. Or we
2 could just get damages under a state cause of action for
3 whatever the potential value is. I'm not sure what the value
4 of it is stands today. But that would be the idea.

5 THE COURT: Okay. Well, I have to say, and you can
6 either move on or not, I'm very confused. Because --

7 MR. SBAITI: Okay.

8 THE COURT: -- no private right of action -- and you
9 say that just applies to damages -- you know, no private right
10 to damages. But you can get the remedy of voiding a contract
11 or voiding provisions of the contract. But somehow at the end
12 of it, you're saying damages or disgorgement? You want to --

13 MR. SBAITI: Sure. Let me be a little bit more
14 specific, Your Honor.

15 If there's a violation of Section 206, the Supreme
16 Court in Transamerica has held that you can seek to avoid the
17 rights of the other party violating Section 206. And then you
18 can seek the equitable remedies surrounding the voiding of
19 those rights. That's what Transamerica held. It held that you
20 can simply walk in and say you violated Section 206. We want
21 damages. But you can seek to (indiscernible) the rights of the
22 violator and then seek whatever equitable remedies arise out of
23 that, whatever those may be.

24 The flip side of that, Your Honor, is that as Judge
25 Boyle has held and as other courts have held, is that because

1 the Advisers Act imposes fiduciary duties, those are formal
2 fiduciary duties recognizable under Texas fiduciary duty law.
3 So I can have a Texas fiduciary duty claim for breach. And
4 then I get the full panoply of remedies, including damages that
5 are available under Texas law for a breach of fiduciary duty.

6 So in other words, Section 206, and both of these
7 regimes simply provides the duty, the basis of the duty. It's
8 a federal law imposition of a fiduciary duty. The violation of
9 that then is actionable through either Section 215, or it's
10 bore by the state or adopted by the state fiduciary duty cause
11 of action. That's what the case law says that we cite.

12 THE COURT: Okay. And again --

13 MR. SBAITI: I'm hoping I'm answering your question.

14 THE COURT: Sorry to interrupt. Maybe you're going
15 to get to this, but --

16 MR. SBAITI: It's okay.

17 THE COURT: But the argument very strongly made --
18 vehemently made by Highland is there's no fiduciary
19 relationship to investors, i.e. the DAF. If you're right, this
20 could only be a tool of CLO Holdco. You disagree with that?

21 MR. SBAITI: I do, for a couple of reasons, Your
22 Honor.

23 THE COURT: Okay.

24 MR. SBAITI: I can address that.

25 THE COURT: Okay, go ahead.

1 MR. SBAITI: And if Mr. Morris is correct, they
2 didn't argue the implications of the contract as it would apply
3 to the fiduciary duty. So I'll address that at the end of
4 these comments, Your Honor.

5 THE COURT: Okay.

6 MR. SBAITI: Because I think they're obviously
7 relevant and they've been brought up. But in terms of simply a
8 matter of federal law, there is a fiduciary duty by Highland to
9 the DAF and its subsidiaries and that's in the agreement that
10 Mr. Morris was going through. So they can't escape the idea
11 that there's not a fiduciary duty. Those fiduciary duties
12 arise as a result of Highland performing services as an
13 investment adviser to the DAF.

14 I think what Mr. Morris was arguing is that because
15 that contract waives anything, what anything -- any liability
16 for anything that was less than gross negligence or intentional
17 misconduct. I think he was arguing that therefore that
18 contract takes away the idea that the fiduciary duties imposed
19 under the Advisers Act, to the extent that they're actionable
20 is negligence. I think he was arguing that goes away, because
21 that's where I understood his argument to come from.

22 I didn't understand his argument to say there is no
23 fiduciary duty from Highland directly to the DAF. In fact, I
24 believe Mr. Demo conceded that that fiduciary duty existed
25 because he was trying to show Your Honor how simple of an issue

1 it is and how not complicated it is in terms of for the
2 purposes of the question of withdrawing reference.

3 So you have a direct fiduciary duty from Highland as
4 the DAF's adviser. You also have a direct fiduciary duty by
5 Highland to Holdco. Now you've heard them cite a case. They
6 call it Goldstein. It's a DC Circuit case. And what Goldstein
7 held is that you own -- is that an investment adviser only has
8 a fiduciary duty to its client. And the client is the Fund.
9 It's not the investors in the Fund.

10 And I mentioned this without mentioning the name of
11 the case. But I mentioned that they had cited cases that deal
12 with Section 206(1) or (2) of the Advisers Act, which Goldstein
13 is a Section 206 -- I believe (2) case. And indeed, it
14 specifically says Section 206(2) specifically only applies to
15 the clients or the advisers due to its client.

16 So under 206(2), indeed, you have a fiduciary duty
17 only for the Fund. The part that they miss is that Rule
18 206(4)-8, which I brought up earlier in regards to when I was
19 going through the mechanisms. That rule was actually passed in
20 response to Goldstein to actually clarify that, no, under
21 206(4), those same duties are going to exist directly to the
22 Fund and its (indiscernible).

23 And that's what I read, Your Honor, the rule and it's
24 -- I believe I read you the statutory -- the actual cite, which
25 is -- get to it again, for Your Honor's record. And it's in

1 the CFR. I believe it's 17 CFR 275.206(4)-8. And it is very
2 clear. And if you look at the SEC -- and the SEC passed it, if
3 you look at when they passed it. They passed it the year after
4 Goldstein. So Goldstein isn't good law for the provision that
5 there's no fiduciary duty to the investor in a Fund. It's just
6 not good law at this point. Nor in any of the other cases that
7 they cite, or that Goldstein backs with the same proposition,
8 because it relies on the wrong part of the statute. The
9 statute, I should say.

10 So now that we have an agreement that Highland and
11 its subsidiary are the investment advisers to HCLOF, and this
12 provision, this regulation passed by the SEC says there -- the
13 duties under 206(4) actually do apply to the investors in the
14 Fund, and not just Fund itself. That's the direct investment
15 advisory relationship to Holdco. So you can get at it either
16 way, Your Honor, under the statute. And that's kind of the
17 point that we make.

18 And then you look at the other cases that we've
19 cited, and the statutes that we've cited, and they're all
20 basically get to the same provision. So the math is pretty
21 simple for us on this. Section 206 of the Advisers Act says,
22 those fiduciary duties, that's what Transamerica and its
23 progeny held. And Rule 206 defines the scope of Section 206,
24 which includes investors in the managed Funds, which means
25 there's a direct fiduciary duty.

1 They hang their hat a lot on the lack of a direct
2 fiduciary duty or the lack of a cause of action for actuating
3 these duties when they've been breached, but they're just
4 simply wrong as a matter of law. In their reply, Your Honor,
5 they also bring up the argument which we talked about a little
6 earlier, that there is -- they cite the Acis -- NexPoint v.
7 Acis decision for a premise that, you know, therefore, there's
8 no private right of action. That's actually not what that case
9 held.

10 What that case held is that under Section 215, you
11 could only void -- you can't void someone's performance of an
12 otherwise lawful agreement. Which is not the issue here.
13 Here, we're saying that an agreement was made in violation of
14 the Advisers Act, because the settlement agreement was
15 predicated on a misrepresentation of fact to the advisers and
16 breached the adviser's duty to cherry-pick for itself the best
17 investments.

18 And if you look at the contract that Mr. -- and which
19 I'll get to now -- look at the contract that Mr. Morris was
20 talking about, right after the provisions he read under the
21 Attachment A specifically says, "It is the policy of the
22 investment adviser to allocate investment opportunities fairly
23 and equitably over time." And it goes on to say that the
24 considerations -- that's its fiduciary duties -- owed to the
25 accounts, the primary mandate of the accounts.

1 In other words, if there are some accounts that are
2 specifically there for certain types of investments, those
3 investments are going to be allocated there. The capital
4 available to the accounts, restrictions on the accounts and the
5 investment opportunity, the sourcing of the investment, the
6 size, and so on. It goes through about 11 different
7 considerations.

8 So as a matter of fact, we can argue later whether or
9 not Highland went through those provisions when it decided to
10 take it for itself. But the most important thing about
11 everything that Mr. Morris read to you about Highland's ability
12 to trade and to do these things, is that the allocation of the
13 investments is amongst its other accounts. It doesn't get to
14 (indiscernible) it somewhere for itself at the expense of its
15 advisees, number one.

16 And number two, if it does, we would argue that
17 that's void under Section 215(a) and (b), that the Advisers Act
18 doesn't let it -- the Advisers Act imposes duties where it's
19 not allowed to do that.

20 Now he cited anew Judge Starr's decision, which I
21 actually haven't had a chance to read. I tried to pull it up
22 while he was reading from it, but it just didn't come up and so
23 I don't know what to say about that specifically, what he found
24 or how he relates in any way.

25 I don't have the underlying documents to see whether

1 or not it's the exact same language or different. But the
2 upshot, I believe, of what he said was that by disclosing all
3 of these things that Highland, the person who signed it
4 basically made an agreement that they were going to let
5 Highland do whatever it did.

6 And that was an informed -- that amounted to informed
7 consent except for one thing, that the Advisers Act doesn't let
8 you do it ahead of time. You have to go through specifically
9 with the actual investment, talk about it just like the
10 provisions in the agreement I was reading from which comes
11 right after Mr. Morris's quotation.

12 And those provisions don't talk about it being ahead
13 of time. Those considerations have to be done on an
14 investment-by-investment basis. So it is a general waiver
15 otherwise, if you're not talking about a particular investment
16 and that's all I can really comment on that, Your Honor,
17 because I don't have Judge Starr's opinion or the underlying
18 facts in front of me, unfortunately.

19 Turning back to sort of the core argument, Your
20 Honor, so the alleged breach we have is that Highland as an
21 adviser is liable for cherry-picking and making it, bringing it
22 over to itself.

23 In our brief, we actually cited a Fifth Circuit case
24 that said that's a violation of the Advisers Act and it's not
25 -- again, it's not a waiveable -- it's simply not waivable in

1 the way that they've cited. And the second alleged breach that
2 we have is that Highland failed to disclose the true violation
3 of it, excuse me, the true valuation of the HarbourVest
4 interest.

5 And so the fact that they didn't do those two things
6 and keep the DAF apprised or keep Holdco apprised as the case
7 may be, are two independent and actionable violations -- and
8 I'm making these points in summary -- and that's really what it
9 boils down to is it was an act of self-dealing.

10 The remedy for breach of fiduciary duty is, Your
11 Honor, as is for any loss suffered by the plaintiff. And I
12 would cite, I would refer Your Honor, for example, to the cases
13 we cited, but also to Hsin-chi-Su v. Vantage Drilling, for
14 example, 474 S.W.3d 284, which also says, under state law
15 disgorgement of profits is an equitable remedy appropriate when
16 a party has breached his fiduciary duty; its purpose is to
17 protect relationships of trust by discouraging disloyalty.
18 We've got both state and now federal remedies, including a
19 panoply of possibilities for violations of breaches of
20 fiduciary duty.

21 Turning to, Your Honor, to some of the arguments that
22 were made by Mr. Morris regarding these, the argument that they
23 make about, excuse me, about Section 215 not having a, having a
24 viable cause of action -- and like I said, the argument's
25 incorrect. It is a viable cause of action -- I admit it is a

1 limited cause of action.

2 It's limited to declaring a provision or a right void
3 and then, you know, crafting an appropriate remedy that arises
4 out of that. But it doesn't mean that there's no cause of
5 action.

6 And I've seen no case cited by them, and I've looked,
7 and I haven't seen a case saying that a Texas or a state
8 fiduciary duty action cannot be predicated on the breach of a
9 federally imposed fiduciary duty, which is what (indiscernible)
10 actually held.

11 Interestingly, Your Honor, twice, at the beginning
12 and at the end of his colloquy, Mr. Morris said that the
13 settlement was essentially a rescission of the HarbourVest
14 investment in HCLOF, a rescission to Highland. The problem
15 with that language and maybe it is a rescission, but I don't
16 see how it could possibly be because we actually pled the
17 background of that transaction.

18 And the background of that transaction is that HCLOF
19 was a hundred percent owned by Holdco, by the DAF, not by
20 Highland. So if it was a rescission then the shares should
21 have gone back to the DAF or Holdco. They shouldn't have gone
22 to Highland if that's how they were going to treat it.

23 And I believe he makes that argument because he
24 wanted to show that it's just not a big deal that this is
25 simply a way to settle the case, and I can see that. This

1 lawsuit is not about unwinding the HarbourVest settlement to
2 drag them back in here and undo and unscramble the egg.

3 But that doesn't mean that there aren't specific
4 equitable remedies that Highland had, excuse me, that the DAF
5 or Holdco had vis-a-vis Highland because of the breaches of
6 fiduciary duty. The fact that he admits that it's a rescission
7 action but it was rescinded to the wrong party, I think, is
8 very telling.

9 I'll briefly touch upon the other arguments, Your
10 Honor. I think, I don't think I need to use all 45 minutes. I
11 think these arguments are pretty well laid out in our brief. I
12 think the law is pretty well laid out in our brief as much as
13 they want to argue that, you know, that we're just misstating
14 it.

15 When he says Highland owes no duty to Holdco, I think
16 I've addressed that. But he also says, well, how could there
17 be a breach of fiduciary duty when Highland was complying with
18 the agreement that Holdco agreed to, and I believe he's talking
19 about the membership agreement. But we have two different
20 readings of the membership agreement, which is why I don't
21 think it's appropriate to dismiss at this stage.

22 The reading that Highland wants you to adopt is that
23 when it says in 6.1, no member shall sell its shares other than
24 to an affiliate of an initial member, thereto, without the
25 prior written consent of the portfolio manager, and then it

1 goes on in 6.2 to say you have to offer it to another member,
2 highland wants you to read that as saying that well, then you
3 can only sell, as long as you don't sell to your own affiliate,
4 which is how we read it, then you're in the clear.

5 But if you actually look at the way it's constructed,
6 it's the member selling to its own affiliate that was supposed
7 to be carved out. So Holdco might be able to sell to its own
8 affiliate. That was the purpose and intent, otherwise it
9 really doesn't make any sense that a member has to offer it to
10 another member unless it sells to another member's affiliate.

11 It's actually kind of an absurd reading that Highland
12 wants you to adopt.

13 THE COURT: You're going to have to repeat that. I
14 got very lost during that.

15 MR. SBAITI: Oh, sure. Would it help if I bring it
16 up, Your Honor?

17 THE COURT: It would be helpful if it was on the
18 screen again, but if you could --

19 MR. SBAITI: May I share my screen, Your Honor?

20 THE COURT: Absolutely.

21 MR. SBAITI: Do you see the contract, Your Honor?

22 THE COURT: I do.

23 MR. SBAITI: I just want to make sure I -- where it
24 says "no member," so it's this language, Your Honor, that we're
25 looking at, 6.1 and then down here, 6.2. And I'll just -- so

1 6.1 first says, "no member shall sell, pledge, charge,
2 mortgage, assign, assign by way of security transfer." And it
3 goes on "other than to an affiliate of an initial member party
4 thereto without the prior written consent of the portfolio
5 manager."

6 That exclusion which also exists in 6.2, prior to
7 making any transfers of shares other than transfers to
8 affiliates of an initial member, or in the case of CLO Holdco
9 or Highland, to Highland, its affiliates or another Highland
10 principal, "a member must first offer to the other members a
11 right to purchase the shares."

12 Your Honor, setting aside the judicial estoppel
13 argument, I'm simply talking about the read of this. What
14 Highland wants you to adopt here is the idea that where it
15 says, "other than transfers to affiliates of an initial
16 member," it's talking about an affiliate of a member other than
17 the one doing the transferring, and that's an absurd read.

18 What it means, the way they read it, it means that
19 if I'm CLO Holdco, I can't transfer it to HarbourVest but I can
20 transfer it to a HarbourVest affiliate. But if I transfer it
21 to HarbourVest, then I have to offer it to the other members.
22 That makes no sense. There's no reason for that.

23 The better reading, we believe, is that the exclusion
24 is that if I'm Holdco, I could transfer it to my own affiliate
25 without offering it to anybody else because it's basically the

1 same person sitting in that membership seat. The same would go
2 for HarbourVest. HarbourVest can offer it to its own
3 affiliate, but shouldn't be able to offer it to somebody else
4 or their affiliate without first offering it to the other
5 membership pro rata.

6 So that's --

7 THE COURT: What about that word --

8 MR. SBAITI: -- the reading in the --

9 THE COURT: -- "initial member?" In your example,
10 you said HarbourVest could only transfer it to an affiliate of
11 HarbourVest, but HarbourVest wasn't an initial member.

12 MR. SBAITI: I actually believe HarbourVest is an
13 initial member to this agreement, Your Honor, because they're
14 actually named up here. Sorry to scroll. See, those are
15 there. I believe all the signatories of this are initial
16 members and I believe that definition is down here. Sorry to
17 scroll fast. I'm just trying to find it. It may not be a
18 defined term here, Your Honor.

19 THE COURT: Well, I saw HarbourVest. It's just what
20 you would expect, all the HarbourVest entities, but it wasn't
21 an initial member. It was not an initial member of HLO or
22 whatever the --

23 MR. SBAITI: It's an initial member of this --

24 MR. MORRIS: Your Honor, I believe it is. I think if
25 you just scroll to the top you'll see they are. This is the

1 original document.

2 THE COURT: They were an initial member?

3 MR. MORRIS: Yes, they were.

4 MR. SBAITI: Yes.

5 THE COURT: Oh.

6 MR. MORRIS: They are right there. This is the

7 original agreement.

8 MR. SBAITI: And they're an original member.

9 MR. MORRIS: I would agree with that. So.

10 THE COURT: Okay.

11 MR. SBAITI: So anyway, Your Honor, our position is
12 it's -- this is at best an ambiguous contract that would
13 require discovery to go into what that was really supposed to
14 mean. I know there is a judicial estoppel. I think that
15 argument's been beaten to death by both sides in the briefing
16 so, you know, we'll rest on our briefing in that issue and, you
17 know, I guess to the extent they are relevant in the exhibits.

18 But, Your Honor, the point of the matter is the
19 agreement, you know, read the way Highland is suggesting just
20 really doesn't make a whole heck of a lot of sense from a
21 practical and common sense standpoint. I think it's ambiguous
22 as to what that meant, "an affiliate of the initial member."

23 I think it was intend -- we believe it was intended
24 to mean the member doing the transferring can transfer to its
25 own subsidiary, its own affiliate without anybody objecting,

1 which makes perfect sense because all of these investment
2 company are, you know, they sometimes need to move investments
3 around.

4 HarbourVest did it. That's why there's ten, you
5 know, the half dozen of their affiliates that are there, Your
6 Honor. So, you know, when it comes down to that, I don't
7 really don't have an argument other than that because I think
8 that's the only argument Mr. Morris made on the membership
9 agreement.

10 And I believe the tortious interference argument,
11 specifically, has, you know, has a little bit heightened
12 relevance because of the testimony and because nobody knew what
13 the actual value was until one of Highland's people left and
14 there was a discussion which you have heard about.

15 I believe at one of the hearings there was a
16 discussion where he actually told some of the advisers to the
17 DAF that those values were actually much higher at the
18 (indiscernible). I think discovery if bears true then there's
19 been a misrepresentation and there should be consequences for
20 those misrepresentations.

21 And nothing in Highland's agreement with the DAF or
22 with HCLOF says that misrepresentations are somehow excused or
23 that those misrepresentations don't rise above the negligence
24 level, you know, to the extent where those are actionable.

25 I don't know if you have any more questions, Your

1 Honor, but that really is the argument, I think. We rest on
2 our briefs and ultimately we have fulsome argument on a lot of
3 these issues the last time. So unless Your Honor has
4 additional questions, I'll rest.

5 THE COURT: I guess a couple of follow-up questions.

6 Okay, I'm zeroing in on the -- what exhibit is this?
7 I think it's Exhibit 6 in your notebook, the amended and
8 restated investment advisory agreement.

9 MR. SBAITI: Okay.

10 THE COURT: Paragraph 11, the exculpation, the
11 indemnification, 11B. I think every single adviser agreement
12 I've seen in my history of dealing with Acis and Highland has
13 had a provision like this, substantially similar if not exactly
14 like this.

15 Is your position that basically even though these
16 provisions are always in investment advisory agreements, this
17 is a meaningless provision? That you cannot contract around
18 some federal fiduciary duty in the IAA, so any, you know,
19 agreement between sophisticated people that says, you know,
20 we're not going to hold you liable for negligence or any other
21 misconduct, it's just wasted ink on paper.

22 It's not -- it's overridden by the IAA.

23 MR. SBAITI: Your Honor, I've seen this. Yes. I
24 mean in a word, yes. I think a lot of times these are in
25 boilerplate -- this is boilerplate -- not only in Highland's

1 but in a lot of investment adviser agreements.

2 And one thing you're allowed to do under the IAA is
3 define the scope of your services, what you're going to do and
4 what you're not going to do in terms of the types of
5 investments you're going to advise; whether you're going to be
6 the one to buy them or make the investor go buy them
7 (indiscernible). There's a whole way to discuss the scope.

8 But within that scope, the Advisers Act is fairly
9 crystal clear in Section 215(a) and (b) that when there is a
10 duty imposed -- and the duties are under Section 206 and
11 elsewhere, by the way. Section 208(d) says you can't do
12 indirectly what you can't do directly, you know, you can't
13 waive those.

14 It specifically says anything that allows someone to
15 not comply with the Advisers Act is void.

16 THE COURT: Okay.

17 MR. SBAITI: And I don't blame investment advisers
18 for putting things, I mean they're not the only ones who put
19 things like this in their contracts to give themselves a
20 fighting chance, I suppose, or to make the arguments that Mr.
21 Morris has made and maybe sometimes they're even successful.

22 But I think the statute is so plain and clear that I
23 don't know how this --

24 THE COURT: Okay. My last question was the motion to
25 dismiss the RICO claim that is --

1 MR. SBAITI: Yes.

2 THE COURT: -- on Page 23 of your response to the
3 motion to dismiss. What about the argument that you dismiss
4 actions not claims pursuant to Rule 41, this is not a proper
5 procedural mechanism for what you're trying to do here.

6 MR. SBAITI: Here's how I was thinking about it, Your
7 Honor, when we put that in. If Your Honor doesn't dismiss the
8 Securities Act claim, essentially the Advisers Act claim, then
9 I think the lead argument that they made because we've pled
10 RICO in the alternative, the lead argument that they made is
11 that if we have an Advisers Act claim we don't have a RICO
12 claim, I think, is correct.

13 So in a world where you uphold the Advisers Act
14 claim, then I think the RICO claim is dismissed with prejudice,
15 without prejudice because we have an actionable Securities Act
16 claim, so I think their lead argument on that was correct.

17 In a world where you dismiss based upon everything
18 because you don't think we have a Securities Act claim, we are
19 asking Your Honor to dismiss that claim without prejudice
20 because we believe there would be other reasons to plead
21 because we do think we can show a, you know, as we argued in
22 response to the first motion to dismiss, there are other things
23 that we think this adviser has done in similar fashion that
24 show a pattern of activity of misleading the activity or
25 violating their duties under state law, for example, but using

1 the interstate wires to accomplish that.

2 We do believe we can plead that, but we agreed with
3 their lead argument that if we succeed on Count 1 then we don't
4 have a RICO.

5 THE COURT: Okay. But what is the efficiency in
6 taking it out now without prejudice to reasserting it? Where's
7 the judicial economy and efficiency there?

8 MR. SBAITI: I guess what we're asking for, Your
9 Honor, is either a dismissal for, well, allowing us to re-plead
10 to meet the other issues that they talked about, which is the
11 further, you know, is there an actual (indiscernible).

12 Rather than brief that all the way, we saw the argument
13 that they've cited which they didn't bring in their first
14 motion, but we saw the argument that they were making, "Well,
15 these two can't co-exist. You can't have a Securities Act
16 claim and a RICO claim." We agree. So if we win our Advisers
17 Act claim, RICO claim goes away. We agree with that.

18 If we don't though, we should be allowed to re-plead
19 because we disagreed with everything else he said. I think we
20 do have, we do meet 9(b), but we should have an opportunity to
21 plead the other acts that we believe make this part of a
22 (indiscernible).

23 THE COURT: Okay, thank you.

24 All right, Mr. Morris, you have seven minutes.

25 MR. MORRIS: Okay. To try to get to this as quickly

1 as I can, first of all, Your Honor, to the extent that Mr.
2 Sbaiti is suggesting that there is more claims to come, I'll
3 just remind him in court that the administrative bar date
4 passed a year and a half ago.

5 Going to Section 6.1, there is not two readings of
6 this. There's nothing irrational about the plain words that
7 are on this page. It says other than to an affiliate of an
8 initial member. It doesn't say other than to an affiliate. It
9 says other than to an affiliate of an initial member.

10 And it makes absolute perfect sense. Just look at
11 the percentages of the interests that were held at the time
12 this agreement was entered into. HarbourVest had almost but
13 not quite 50 percent and every entity and person controlled by
14 Mr. Dondero, the majority.

15 Mr. Dondero was in control. He didn't care if, you
16 know, it was never going to happen under his watch that somehow
17 somebody was going to transfer something to HarbourVest. He
18 was always going to be in control, so it didn't matter to him.

19 It didn't matter to him how among the members it was
20 transferred because the one thing he knew was not going to
21 happen was that he was not going to lose control. I guess he
22 just didn't foresee the bankruptcy two years later. But that's
23 perfectly consistent with this.

24 What this provision does say is that we're keeping
25 this in the family. We're keeping this among ourselves and

1 we're not letting anybody in who's not already here. Because
2 dealing with the people who are already here, he knew he would
3 always be in control and that's perfectly consistent with the
4 way this is drafted.

5 The language is unambiguous, "other than to an
6 affiliate of an initial member." That is exactly what this
7 transaction did. It transferred HarbourVest's interests.
8 HarbourVest was a member. It transferred HarbourVest interest.
9 They sold, they assigned, they transferred, actually, the word
10 is "transfer."

11 HarbourVest is the member who transferred its
12 interest to an affiliate of an initial member. Highland is the
13 initial member. Actually, Your Honor had it right before
14 because HarbourVest actually acquired its interest from CLO
15 Holdco, so you were right. I don't know that HarbourVest was
16 an initial member, but I know Highland was. I know HarbourVest
17 was a member. But these provisions say --

18 THE COURT: Yeah. And again, I'm not counting -- I
19 had thought it came along, you know, a couple years down the
20 road but, you know, shortly --

21 MR. MORRIS: You may be right.

22 THE COURT: -- shortly before the whole Acis. But
23 anyway, but I guess Mr. Sbaiti's wanting me to read this
24 parenthetical in 6.2 as other than transfers from --

25 MR. MORRIS: To an affiliate.

1 THE COURT: -- an initial member to its own
2 affiliate. And that's, it's not worded that way.

3 MR. MORRIS: It's not what it says.

4 THE COURT: Yeah.

5 MR. MORRIS: It's just not what it says. It may be
6 what they wish it said today, but that doesn't -- you can't
7 just change a contract to make it say what you wished it did.
8 This is the contract that they drafted. This is Dondero's
9 contract.

10 It says other than to an affiliate of an initial
11 member. And it's kind of irrelevant as to whether HarbourVest
12 was an initial member. The important point is that Highland
13 was an initial member and HarbourVest was a member. So the
14 member HarbourVest transferred its interest to an affiliate of
15 an initial member. Period, full stop. It was permitted under
16 6.1 and the ROFR doesn't apply under 6.2.

17 Number two, next, the concept of rescission is a
18 euphemistic term, okay. It's not like what Mr. -- because, you
19 know, if Mr. Sbaiti was right and we were trying to undo it and
20 put everybody back to where they were, his clients would have
21 to take on \$300 million of liability.

22 You don't just get to take the interest. The whole
23 thing was part of a transaction. He forgot the 300 million
24 dollar debt. Let's go to Section 215. 215 is not anywhere in
25 the complaint, okay, but the important point here is what does

1 215 say?

2 If you go back to the Nexpoint case from the Southern
3 District of New York, it says that every contract made in
4 violation of a provision of the Investment Advisers Act shall
5 be void. Period. Full stop. It doesn't have other remedies.
6 It doesn't mean that the plaintiffs here get money.

7 In fact, I would argue that they don't even have
8 standing to pursue this under 215. They are not party to the
9 agreement. How do they even have the ability to come in?
10 There's no case that Mr. Sbaiti can cite to. No court has ever
11 said a nonparty to the agreement can come in and somehow try to
12 void it.

13 No case in the history of the world has ever said
14 that a third party who's not party to the agreement cannot only
15 come in and void the agreement but somehow benefit from it.
16 They're nobody. Like the plaintiffs are nobody here. The
17 agreement that they signed said that Highland that they didn't
18 have a right of first refusal.

19 The agreement that the court approved was an
20 agreement between Highland and HarbourVest. If there's a
21 misrepresentation as to the price, maybe HarbourVest has a
22 complaint. I don't know what their remedies would be. I'm not
23 saying they do, but they're not here.

24 Who are the plaintiffs? What on earth gives them the
25 right to come in here and say they should have that contract,

1 they should have that benefit without, of course, the
2 liability? There's nothing. It's prohibited under the
3 members' agreement.

4 It's permitted under the advisory agreement. No
5 fiduciary duty at all. How can you breach a fiduciary duty
6 when all you're doing is complying with the terms of the
7 parties' agreement? There's no connection between 215 and 206,
8 like he said.

9 There's no case that's ever said that. Just take a
10 look at the Nexpoint case from the Seventh District of New
11 York. It says a plaintiff may only pursue a remedy, may only
12 pursue a claim to avoid the contract, right. That's all there
13 is to it.

14 And so again, you can't just unwind the portion of
15 the contract that they're really interested in. You can't just
16 say Highland has to give back its interest. That means that
17 Highland also has to pay back the 300 million-dollar liability.
18 Where is HarbourVest here? How come HarbourVest doesn't have
19 notice? How come -- think about how HarbourVest's rights would
20 be impacted from what the plaintiffs are saying here.

21 They need to be at the table. They're the biggest
22 party of interest of all. They thought this was in their
23 rearview mirror. They wanted to get out of here. And now
24 we're going to -- you can't just unwind part of a contract.
25 You have to unwind the whole contract.

1 This is so much, this is so untenable, Your Honor,
2 that it really needs to be dismissed with prejudice. I think
3 that's all I have. I mean there's no -- you know, the remedies
4 that are being suggested now, they're not in the pleading. But
5 how, I just ask the Court to consider where's HarbourVest?

6 How do you unwind the piece of the transaction and
7 not the only full transaction? Where does the plaintiff who
8 agreed that it wouldn't have a right of first refusal, who
9 agreed that Highland could pursue transactions on its own
10 without notice of the other side, how do they come in here and
11 try to undo a piece that they want? They can't.

12 Complaint should be dismissed with prejudice, Your
13 Honor. Thank you very much.

14 THE COURT: All right. Thank you all.

15 Well, I'm obviously going to take this one under
16 advisement and read all of your cases and pleadings. And I
17 feel like I'm becoming a broken record on that sentence. Right
18 now let's see where we are under Highland advisements.

19 We have the written ruling I need to do on the motion
20 to conform plan to be consistent with the Fifth Circuit. We
21 have the HCRE proof of claim trial. And then we have the
22 motion, the renewed motion to recuse me, and then now we're
23 going to have this, okay?

24 So that's going to be four Highland matters under
25 advisement. All I can tell you is we've had a brutal December

1 and January with things under advisements, trials, and
2 different court commitments of all different kinds. So I hope
3 we can have a very productive rest of January and February and
4 March.

5 Inside baseball, judges, they tend to look at March
6 31st and September 30th as important catch-up days because we
7 do these reports of how many things you have under advisement
8 to our circuit courts. And I'm just giving you that inside
9 baseball to let you know I really anticipate catching up on
10 some of these things before that looming deadline. But
11 hopefully, hopefully sooner.

12 And, of course, the report and recommendation I
13 should have that out in a few days because I need to get that
14 squared away, I feel like with the district court, especially
15 since a different district judge is now in that loop because of
16 what I think was a mess up between the clerk's offices.

17 So anyway --

18 MR. MORRIS: They've been pretty good about moving
19 them when we've asked, Your Honor, as well. So maybe we can
20 file something.

21 THE COURT: Okay. All right. But just circling
22 back, the report and recommendation I should have out in a few
23 days. But there may be a little bit of waiting on the ruling
24 on the motion to dismiss.

25 All right. Is there anything else as far as

1 housekeeping?

2 MR. MORRIS: Just thank you very much, Your Honor. I
3 know this was a long day. We appreciate your diligence, as
4 always, and for your time.

5 THE COURT: Okay. All right.

6 MR. SBAITI: Thank you for your time, Your Honor.

7 THE COURT: Okay. Thank you. We're adjourned.

8 THE CLERK: All rise.

9 (Proceedings concluded at 4:35 p.m.)

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13 **C E R T I F I C A T I O N**

14 I, DIPTI PATEL, court approved transcriber, certify
15 that the foregoing is a correct transcript from the official
16 electronic sound recording of the proceedings in the above-
17 entitled matter, and to the best of my ability.

18

19 /s/ Dipti Patel

20 DIPTI PATEL, CET-997

21

22 LIBERTY TRANSCRIPTS

DATE: January 26, 2023

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